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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOSEPH STAPLETON, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110), and ALL PERSONS INTERESTED THEREIN,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief and the Associate Justices of the Supreme Court of the United States:

Petitioners Joseph Stapleton, Treasurer of the County of Hudson, and the County of Hudson respectfully pray

that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which reversed the judgment entered in favor of petitioners in the United States District Court for the District of New Jersey.

Opinions Below

The opinions rendered in the Court of Appeals are printed in Appendix A (5a to 30a),* and are reported in 454 F.2d 1210 (1972). The opinion of the District Court has not been reported and is printed in Appendix B (31a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code §1254(1).

The judgment of the Court of Appeals was entered on January 25, 1972, and a petition for rehearing was denied February 28, 1972 (App. A, 1a to 3a).

Questions Presented

Introductory

Petitioner, County of Hudson, a political subdivision of the State of New Jersey, brought an action in the state court against the District Director of Internal Revenue

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* The appendix to this petition is separately bound and filed herewith.

for wrongfully levying on property—specifically $2.4 million in cash—belonging to Joseph V. Moriarty, an oft-convicted gambler, on the ground that Moriarty's property rights therein had been forfeited to the County of Hudson prior to the time that the Government's tax lien arose. The District Director removed the action to the Federal District Court pursuant to 28 U.S.C., §1442(a)(1), it appearing from the removal petition that the District Director had deposited the money into the Treasury prior to suit. The action was tried in the District Court as a suit seeking *in personam* relief against the District Director for wrongfully appropriating plaintiff's property and, alternatively, against the United States, which had been added as a party defendant, because of the enactment while the litigation was pending, of 26 U.S.C., §7426 (approved November, 1966).

The trial in the District Court resulted in a judgment in favor of the plaintiff against the United States and in the alternative against the District Director. The Court of Appeals for the Third Circuit reversed.

The questions presented are:

1. Did the Court below err in holding that petitioners' suit against the District Director, which sought a personal judgment against him for wrongfully levying upon and covering into the Treasury petitioner's property in order to satisfy a tax lien against Moriarty, was a suit against the United States and therefore could not be instituted in the state court?

2. Did the Court below, in reversing the judgment of the District Court on the asserted ground that the state court from which the action was removed had no jurisdiction and therefore the federal court lacked jurisdiction, thereby render a decision in conflict with the holding of another Court of Appeals in the Ninth Circuit in *Johnston* v. *Earle*, 245 F. 2d 793 (1957)?

3. Should not the conceptual basis of "derivative" federal removal jurisdiction be rejected in this case by reason of the fact that while the suit was pending in the Federal District Court pursuant to the District Director's removal, Congress enacted 26 U.S.C., §7426, which, for the first time, permitted such actions to be brought directly against the United States in the Federal Courts, and provided for the substitution of the United States as a party defendant as of the time when such action was commenced?

4. Did the Court below render an opinion on the merits in conflict with the applicable decisions of this Court holding the question of whether, and to what extent, a taxpayer has "property" or "rights to property" under 26 U.S.C., §6321, to which a Federal tax lien could attach to be solely a matter of state law?

5. Did the Court also decide important questions of New Jersey law in a manner contrary to the applicable decisions of the New Jersey Supreme Court? Specifically, were the District Court's express findings that the money in suit was a product of gambling and was needed by Moriarty as the "bank" for his large-scale, non-syndicated numbers operation supported by substantial evidence?

6. Did the Court below err in holding that a New Jersey statute of limitations, raised for the first time by the United States on appeal, barred the County's substantive claim?

Statutes Involved

26 U.S.C., §6321 provides:

> "Lien for taxes
>
> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount

(including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

26 U.S.C., §6322 provides:

"Period of lien

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."

28 U.S.C., §2006 provides:

"Execution against revenue officer

"Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:

"(1) probable cause existed or

"(2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.

"When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury."

26 U.S.C., §7426 (P.L. 89-719, §110(a), approved November 2, 1966), which for the first time, provided that third persons (non-taxpayers) who claimed an interest in property wrongfully levied upon could bring civil actions directly against the United States. The provisions thereof are lengthy and are printed in Appendix E, 73a.

28 U.S.C., §1442(a)(1), pursuant to which the District Director removed this action to the District Court, provides in pertinent parts as follows:

> "Federal officers sued or prosecuted
>
> "(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

The following New Jersey statutes, as interpreted and construed by the Supreme Court of New Jersey, are involved: N.J.S.A. 2A:152-6 (derived from New Jersey Laws, 1878, ch. 78, p. 137), and New Jersey Laws, 1941, ch. 70, p. 156 which now appear as N.J.S. 2A:152-7, 8 and 9. Although nothing in the case turns on the language of the statutes, they are printed in Appendix E, 76a to 79a.

N.J.S.A. 2A:14-10, a New Jersey limitations statute, is cited and quoted in full in the opinion below (App. A, 17a), and printed in App. E at 79a.

Statement

This petition presents for review an important question of federal jurisdiction decided adversely to petitioner in the Court below. To pose that question, as well as the questions resulting from the divergent views expressed in the opinions rendered in the Court below as to the merits of the controversy,* it is necessary to trace the proceedings in some detail.

This action involves competing claims of petitioner County of Hudson and respondents United States of America and Chris L. Gross, former District Director of Internal Revenue for the District of New Jersey, to the sum of $2,438,110. This amount of cash was discovered on July 3, 1962, when some workmen who were installing overhead doors in private garages located at 127-131 Oxford Avenue, Jersey City, New Jersey, broke into the trunk of an old, inoperable automobile parked in one of the garages.

The garage was rented by, and the car and currency had been in the possession and control of one Joseph V. Moriarty, the reputed kingpin of the "numbers racket" in and around Jersey City.

The United States based its claim on a jeopardy assessment, made by defendant Gross against Moriarty on July 5, 1962, and a consequent federal tax lien against Moriarty

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* The opinion of the Court, per Judge McLaughlin, holds that the District Court erred as a matter of law in deciding the case on the merits in favor of the County. The concurring opinion, filed by Judge Adams and concurred in by Judge Ganey, holds that if subject matter jurisdiction had been present in the District Court, he would have remanded the case for further findings of fact (App. A, p. 30a).

arising as of that date, under 26 U.S.C., §§6321 and 6322. The County, on the other hand, contended that by July 5, 1962, any "property" or "rights to property" which Moriarty may have had in the money, had already been forfeited to the County under state law by reason of its connection with Moriarty's illegal gambling operation. 26 U.S.C., §6321, and *Aquilino* v. *United States,* 363 U. S. 509, 512 (1960).

Moriarty's criminal record for violations connected with his illegal gambling activities dates from the 1930's. On February 20, 1962, while free on bail pending sentence (pursuant to a previous plea of guilty to a 1960 gambling indictment) he was again arrested by local law officers and charged with possession of lottery slips. Bail was immediately revoked, he was remanded to custody and sentenced to a term of years in the state's prison. He remained in official custody at all relevant times thereafter.

The $2.4 million involved in this suit was discovered, as stated, on July 3, 1962, some four-and-a-half months after Moriarty's last arrest had put him out of business. The workmen notified the F.B.I. of the discovery. Agents of that department thereby obtained physical custody of the money at the outset, and later turned the money over to the United States Marshal.

On July 5, 1962, defendant Gross made a jeopardy assessment against Moriarty for delinquent income taxes and interest in the amount of about $3.4 million, which assessment was based, for all practical purposes, solely on the discovery of July 3. On July 16, Gross levied upon the money in the hands of the Marshal, received possession of the funds and deposited them to the credit of the Internal Revenue Service in the designated depositary bank.

Meanwhile, on July 6, 1962, Jersey City police had discovered the sum of $168,400.97, as well as assorted gambling paraphernalia in a private garage located just down the street from the garage in which the $2,438,110 had been found three days earlier. That sum of money likewise belonged to Moriarty.

The suit at bar was instituted by the County in September, 1962, in the New Jersey Superior Court to obtain an adjudication that the $2.4 million was "used and intended to be used by Moriarty as an integral part of his illegal gambling operation and with the proceeds thereof" (App. G, p. 92a), and was thus contraband and forfeited to the County under New Jersey law. N.J. S. 2A:152-6, *et seq.* The complaint referred to Chris L. Gross, District Director of Internal Revenue, as one of several parties who had asserted a claim to the money. The complaint also alleged that the $2.4 million were being held "subject to a determination by a court of competent jurisdiction that part or all of said moneys should be turned over to persons or governmental agencies other than the United States."* (*Ibid.*).

On October 16, 1962, the District Director removed the action to the United States District Court. The removal petition recited the various steps taken by Gross to enforce the July 5, 1962 tax lien against Moriarty, ending with the deposit of the $2.4 million in the Nation-

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* The quotation was taken from the United States Attorney's letter of July 20, 1962, advising an attorney for other claimants to the fund that although the money was then "credited" to the account of the Internal Revenue Service . . ." it would be "made available . . . if it is determined subsequently by a court of competent jurisdiction that part or all of said property should be re-distributed to persons or governmental agencies other than the United States of America" (App. H, p. 110a).

al State Bank in Newark, and the statement that "within 24 hours [thereafter] said moneys were credited to the account of the Secretary of the Treasury . . . and thus covered into the United States Treasury." The removal petition asserted that the aforesaid acts were performed by Gross "solely under the color of his office" and that the action was therefore removable under 28 U.S.C., §1442 (a)(1) (App. G, 95a to 98a).

The County thereafter moved, unsuccessfully, to remand the suit to the state court. In denying the motion, the District Court filed an opinion (App. C, p. 39a), holding (1) since the money had been covered into the Treasury before the suit was instituted, neither the State nor the Federal Courts could exercise any jurisdiction *in rem;* (2) although the complaint was captioned in the form of an *in rem* action, the real purpose of the suit was to obtain a judgment *in personam* against the District Director for levying on property which the County claimed had been forfeited to it under state law; (3) the action therefore was removable under §1442(a)(1); and (4) the federal court, as well as the state court was "competent to adjudicate the rights to the fund on an *in personam* level" (App. C, p. 44a).

Accordingly, with the consent of the United States Attorney, prior to trial the County filed an amended pleading, the effect of which was to make the prayers for relief technically conform to an *in personam* action (App. G, pp. 99a).

The District Director's answer to that pleading, filed May 29, 1968, asserted, for the first time, that by reason of the passage of 26 U.S.C. §7426 (approved November, 1966), the case should be dismissed as to the District Director and the United States substituted as the party

defendant (App. G, p. 102a). That statute changed pre-existing law by providing that third persons (non-taxpayers) could maintain suits directly against the United States for wrongful tax levies (App. E, p. 73a).

The pleadings were thereafter twice amended (App. G, 103a to 109a) the net effect being that the action proceeded to trial against the United States (under 26 U.S. C., §7426), and alternatively against the District Director, coupled with a prayer that in the event of judgment against the latter a certificate be issued for payment of the judgment out of the United States Treasury pursuant to 28 U.S.C., §2006 (App. E, 109a).

The case was tried in the District Court during January, 1969. The testimony on both sides concurred in the factual conclusion that the $2.4 million was wholly the product of Moriarty's gambling business. A State prosecutor's investigator and a staff detective, appearing for the County, testified that the money was the proceeds of gambling (R327a; 330a-336a; 377a; 380a-388a)*; while a special agent of the Internal Revenue Service, testifying for the Government, who had engaged in prolonged tax investigations of Moriarty's activities, described the fund as "a cash hoard . . . from . . . his wagering business" (R604a; 606a-607a; 641a).

The County also adduced substantial evidence that the money was an integral part of Moriarty's gambling operation because it was used, or held for use by Moriarty, as the "bank" for his huge, solely-operated "numbers" business (*i.e.*, it was the "money required to pay off bets where the wheel of fortune gives a negative answer." *State* v. *Link,* 14 N.J. 446, 453, 102 A.2d 609, 613 (1954)).

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* "R" refers to the printed appendix to the brief filed by the United States in the Court of Appeals.

At the close of the trial, the District Court reserved decision because the New Jersey Supreme Court had just granted certification in the related case involving the moneys seized on July 6, 1962.*

In November, 1969, the New Jersey Supreme Court affirmed the lower court's judgment in favor of the County. *Farley* v. *$168,400.97,* 55 N.J. 31, 259 A.2d 201 (1969). The opinion, which contains an exhaustive discussion of New Jersey forfeiture law, is printed in Appendix D, p. 50a.

Thereafter, on May 25, 1970, the District Court filed its opinion herein, holding that in view of the state law as set forth in *Farley* v. *$168,400.97, supra,* Moriarty's title to the $2.4 million had been divested and forfeited to the County of Hudson as gambling contraband, so that any interest which Moriarty may have had in the currency was extinguished and his property rights thereto forfeited to the County prior to July 5, 1962, the effective date of the Federal tax lien (App. B, p. 31a). Judgment was entered in favor of the County against the United States pursuant to 28 U.S.C., §7426, and in the alternative, but only in the event that it should ultimately be determined that §7426 did not apply to this action, against the District Di-

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* That case was also brought by the County in the state court and removed by the District Director to the District Court, under 28 U.S.C., §1442(a)(1). However, in that case, the County officials obtained physical custody of the funds at the outset, so that the State Court had jurisdiction and control over the *res* and no *in personam* relief was being sought "against" the District Director. Accordingly, in an opinion published *sub nom State of New Jersey* v. *Moriarty,* 268 F.Supp. 546 (1967), the District Court had held that that action was not removable by the District Director under §1442(a)(1), and had granted the County's motion to remand.

rector, together with an appropriate certificate for payment of the judgment out of the United States Treasury, pursuant to 28 U.S.C., §2006.

The Court of Appeals reversed. The opinion of the court, per Judge McLaughlin, as well as the concurring opinion per Judge Adams, held that the District Court lacked jurisdiction over the subject matter because the State court from which the action was removed lacked jurisdiction. Both opinions also dealt with the merits. Judge McLaughlin concluded that, as a matter of law, the moneys on suit were not subject to forfeiture under New Jersey law. Judge Adams held that if jurisdiction were present, the matter would have to be remanded to the District Court for further findings of fact regarding Moriarty's use of the $2.4 million (App. A, 30a). Judge Ganey concurred in result and in Judge Adams' concurring opinion (20a).

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Court below erred in its characterization of the petitioner's action against the District Director seeking a personal judgment against him for wrongfully levying on and covering into the Treasury petitioner's property, as a suit against the United States and consequently not within the original jurisdiction of the state court.

In reversing the District Court's judgment and ordering the case to be dismissed for want of subject matter jurisdiction, the Court below relied upon *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* 258 U.S. 377, 382 (1922), which holds: "The jurisdiction of the federal court

on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."

However, in holding that the state court lacked subject matter jurisdiction over the case at bar, the Court below decided an important question of federal jurisdiction in a way that conflicts with applicable decisions of this Court, which have uniformly held that suits against district directors (formerly collectors) of Internal Revenue, which were derived from the common law, are not in legal contemplation suits against the sovereign.

A.

It must first be noted that the determination below was based upon a demonstrably erroneous premise as to the true nature of this suit. The opinion below states (App. A, p. 9a):

> "At no time in fact or in law did state or local officers possess custody or control of the currency; the state court simply never did have jurisdiction over the subject matter."

Although state officers never had "custody or control" over the $2.4 million, in a physical sense, it does not follow therefrom that the state court therefore never had jurisdiction over the *subject matter* of the action. Jurisdiction over the subject matter of a suit denotes the power of a court to decide the controversy. That power can be exercised *in personam, i.e.,* by rendering a judgment that operates against party to the action, or *in rem,* in which case the judgment of the court affects parties to

the action only to the extent that they claim an interest in an identifiable *res*.

In the instant case, the money in suit had been deposited in a bank and covered into the Treasury prior to the institution of suit. This fact alone prevented any court, state or federal, from adjudicating the substantive issue as an incident of *in rem* jurisdiction. However, the absence of physical custody or control over the moneys in no sense prevented the state court, which admittedly had acquired jurisdiction over the person of the District Director, from deciding the controversy on an *in personam* basis, *i.e.*, by rendering a personal judgment against the defendant District Director for wrongfully appropriating the plaintiff's property.

Congress has specifically recognized that judgments *in personam* may be rendered against a collector or other revenue agent for the recovery of moneys "exacted by or paid to him and subsequently paid into the Treasury," by providing that where an appropriate certificate has been issued, execution shall not issue against the personal assets of the collector, but the amount of such judgments "shall be paid out of the proper appropriation by the Treasury." 28 U.S.C., §2006, and its predecessors; *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373 (1933); *United States* v. *Kales*, 314 U.S. 186 (1941).

The fact that the complaint, as originally filed, was erroneously captioned in the form of an *in rem* action is immaterial. It is settled that the true aim and object of the action, and not the designation invoked by the plaintiff, determines if it is *in rem* or *in personam*. *National Surety Co.* v. *Austin Machinery Corp.*, 35 F.2d 842 (6th Cir. 1929); *In re Lummis' Estate*, 118 F. Supp. 436, 439 (D.N.J. 1954); *Beck* v. *Otero Irr. Dist.*, 50 F.2d 951 (D.

Colo. 1931); *State of New Jersey* v. *Moriarty, supra* (268 F. Supp. at 557). ". . . A proceeding which aims at the person of the defendant and not at his property or some other thing within the power or jurisdiction of the court is not an action in rem." *National Surety Co.* v. *Austin Machinery Corp., supra* (at p. 843). In the instant case, once it became known that the money had been deposited by the defendant District Director into the United States Treasury, the only possible aim or object of this suit was to secure a personal judgment against the District Director for wrongfully appropriating property which the County claimed belonged to it under state law.

Indeed, if this had not been an action seeking a personal judgment against defendant District Director, he could not have removed the cause to the federal courts under 28 U.S.C., §1442(a)(1). It has uniformly been held that a suit which merely has as its object a determination of rights in specific property and does not expose a federal revenue officer to any personal civil or criminal liability, is not removable under §1442(a)(1). *State of New Jersey* v. *Moriarty, supra; Ford Motors Co.* v. *Automobile Insurance Co.,* 13 F.2d 415, 417 (E.D. Mich. 1926); *Fountain Park Co-op* v. *Bank of America,* 289 F. Supp. 150 (C.D. Cal 1968). And, as stated above, after removal the pleadings were amended so as to reflect the fact that this was an *in personam* action against the District Director (App. G, 99a), and later against the United States as well, by reason of the enactment of 26 U.S.C., §7426 during the pendency of the case (App. G, p. 108a). The case was tried on that basis and the judgment rendered in the District Court was unquestionably *in personam* and not *in rem.*

B.

In holding that the state court had no jurisdiction to determine this controversy, the Court below also stated (App. A, 12a):

> "It is settled law that a suit directly concerning the title to property in which the United States has an interest is a suit against the sovereign which absent the consent of the sovereign, cannot be maintained in the state court."

While the quoted statement may accurately reflect the settled law with respect to suits brought against other federal officers, it does not apply where, as here, the party defendant is a District Director of Internal Revenue and the object of the suit is to obtain a determination that the defendant has wrongfully levied on the property of the plaintiff in order to satisfy a third person's tax liability.

The historical basis and juridical nature of suits against collectors have been described in detail in many of this Court's opinions. See *e.g., Philadelphia* v. *Diehl,* 5 Wall. (72 U.S.) 720 (1867); *Moore Ice Cream Co.* v. *Rose* and *United States* v. *Kales, both supra.* The right to maintain such actions against collectors was based solely on the common law. As stated in *Philadelphia* v. *Diehl, supra,* the "appropriate remedy to recover money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received." Accordingly, such actions historically could be and were initiated in the state courts, subject to the collector's option to have the controversy determined on the merits in a federal forum by exercising his statutory right of removal. Thus, while such cases generally were litigated in the Federal Courts, they were often initiated in the

state courts without any apparent challenge to that original jurisdiction or to the Federal Court's jurisdiction after removal. See *e.g., Philadelphia* v. *Diehl supra,* and *Arnson* v. *Murphy,* 109 U.S. 238 (1883).

This Court's opinions in *Moore Ice Cream* and *Kales, supra,* trace the subsequent developments with respect to suits against collectors in considerable detail. For present purposes the main point is that at common law, and for many years under federal statutes, protest at the time of payment was a condition precedent to maintaining suit, and the protest was a warning to the collector not to pay into the Treasury the moneys collected. However, statutes first enacted in 1839, and progressively broadened thereafter, imposed upon the collector the duty to pay the money over to the Government, protest or no protest, and along with that duty there went a "pledge of indemnity by the Government itself", where, under appropriate circumstances, the amount of the judgment rendered against the collector was to be paid out of the Treasury. See *Moore Ice Cream Co.* v. *Rose,* 289 U.S. at 380-381; *United States* v. *Kales,* 314 U.S. at 197-199. At the time the suit at bar was instituted, that pledge of indemnity was contained in 28 U.S.C. §2006.

But those cases also clearly held, that the United States' promise of indemnity did not in legal contemplation convert the common law suits against collectors of Internal Revenue into suits against the Government. The doctrine of sovereign immunity was therefore inapplicable. Thus, although in a suit against a collector acting in the line of duty "his presence as a defendant is merely a remedial expedient for bringing the Government into court." *Moore Ice Cream Co.,* at p. 383, "the judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it." *United States* v. *Kales,* 314 U.S. at 199-200.

Although *Moore Ice Cream Co.* and *Kales* both involved suits by a taxpayer against the collector, the same relief has been held available to non-taxpayers, *i.e.*, persons claiming that the collector had wrongfully levied upon their property to satisfy another's tax liability. *Stuart* v. *Chinese Chamber of Commerce*, 168 F.2d 709, 713-4 (9th Cir. 1948); *First National Bank of Emlenton* v. *United States*, 265 F.2d 297, 300 (3rd Cir. 1959). In *Stuart*, the Ninth Circuit, after quoting from *United States* v. *Kales*, stated:

> "Thus it will be seen that Congress has devised by appropriate legislation the means of protecting not only the rights of a taxpayer but also to indemnify the collector on a certificate of probable cause against a personal judgment for illegally exacted taxes. We are not directed to any law which would deny the same protection to a non-taxpayer from whom moneys have been illegally seized, nor would good conscience sanction such procedure." 168 F.2d at 714.

Clearly, if a taxpayer's suit against a collector of Internal Revenue was based upon and derived from the common law, it necessarily follows that a non-taxpayer whose property had been wrongfully levied upon by the defendant collector had rights under the common law to maintain such suits (the only difference being that in the case of taxpayers, the common law remedy was in assumpsit; whereas in the case of non-taxpayers, the action would be in the nature of conversion or trespass). Therefore, such suits *prima facie* were cognizable in the state courts, and such jurisdiction existed unless it was negated by a clear statutory command.

The Court below cited no such federal statute. Nor are we aware of any statute in existence when this suit

was instituted in 1962, which derogated in the least from the County's right to attempt to litigate its substantive claim against the District Director in the state court, subject, of course, to the latter's removal option.

A fundamental distinction, not recognized in the opinions below, between suits brought by taxpayers as opposed to non-taxpayers, is that Congress had undertaken to deal specifically with the former. Thus, a taxpayer seeking to vindicate his rights must follow basic statutory procedures in challenging a federal tax assessment or levy against him. However, at the time this suit was instituted, Congress had prescribed no limitations on the manner or forum in which non-taxpayers could vindicate their rights where, as here, a collector had wrongfully levied upon his property and covered the proceeds into the Treasury.* It follows therefrom that the County retained its common law right to maintain an *in personam* action against the District Director in the state court, subject to the latter's removal option.

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* In the Court below, the Government had asserted that 28 U.S.C., §2463 constituted a specific statutory bar to original state court jurisdiction. However, that staute, which provides that property "taken or detained" under any Internal Revenue law shall be "subject only to the orders and decrees" of the federal District Courts, was enacted in order to protect the custody of property seized by federal revenue officers while it was in their possession, against "more or less summary state court action," *New Hampshire Fire Ins. Co.* v. *Scanlon,* 362 U.S. 404 (1960). It has uniformly been held that §2463 does not apply where, as here, the property levied upon has already been converted into cash and the proceeds covered into the Treasury and thus, no longer exist as an identifiable *res. First National Bank of Emlenton* v. *United States, supra* (265 F2d at 300); *Pennsylvania Turnpike Commission* v. *McGinnes,* 268 F.2d 65, 66 (3d Cir. 1959).

Moreover, there are sound policy reasons to support the view that a state court has original jurisdiction of actions brought by non-taxpayers against collectors of Internal Revenue. By definition, the validity or amount of the assessment is not at issue. The only issue in such cases is whether and to what extent the taxpayer had "property" or "rights to property" to which the federal government's tax lien could attach under 26 U.S.C., §6321. And this Court has consistently held that that issue must be resolved solely by reference to state law. *Aquilino* v. *United States*, 363 U.S. 509 (1960). It is therefore entirely consistent with federal policy for the courts of the several states to exercise original jurisdiction in such cases. As this Court stated in *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936):

> ". . . Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them . . ."

And, it is familiar and normal procedure for the United States to undertake to vindicate its tax liens in suits instituted in state courts by some other claimants of rights in the property. See *e.g.*, *United States* v. *City of New Britain*, 347 U.S. 81 (1954); *United States* v. *Vorreiter*, 355 U.S. 15 (1957).

II.

A classic situation for certification is presented when, as herein, the decision sought to be reviewed proclaims a rule which is contrary to that adopted by the Court of Appeals of another Circuit.

The decision of the Court below is in conflict with the decision of the Court of Appeals of the Ninth Circuit in *Johnston* v. *Earle,* 245 F.2d 793 (1957),* where it was held that state courts do have original jurisdiction over a suit brought against the Collector of Internal Revenue for wrongfully levying upon property to satisfy tax liens. In that case, the Collector and other revenue agents, acting in their official capacities, seized plaintiff's tractor pursuant to a federal tax levy. Plaintiff brought suit in the Federal District Court, seeking damages by reasons of defendants' allegedly tortious conversion of his property. A trial on the merits resulted in judgment for defendants. The Ninth Circuit reversed, holding that while the plaintiff's cause of action was "undoubtedly a tort cognizable in a state court," no federal statute had conferred original subject matter jurisdiction upon the federal district courts. 245 F.2d at 796. The Court held that 28 U.S.C. §1340 was inapplicable, as plaintiff's cause of action did not "arise under the internal revenue laws," and thus reaffirmed the cases cited above in our discussion of the first question which demonstrate that the County's claim against the district director for wrongfully appropriating its state-created property rights was "undoubtedly cognizable" in the state court in the first instance.

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* The opinion in *Johnston* is printed in full in Appendix F, 80a.

In holding that plaintiff's claim against the collector for wrongfully converting his tractor was cognizable in the state courts, and that the federal courts had no concurrent *original* jurisdiction over the subject matter, the Ninth Circuit quoted at length from *Slocum* v. *Mayberry,* 2 *Wheat.* (15 U.S.) 1 (1817) (App. F., p. 83a-84a). In that case, this Court early established the principle that private property rights which are enforceable against federal revenue officers are within the original jurisdiction of the state courts, unless some Congressional statute has specifically conferred exclusive original jurisdiction on the federal courts (see 2 Wheat. at pp. 10 to 12).

The Ninth Circuit thus recognized the fundamental distinction, for jurisdictional purposes, between suits brought against District Directors by taxpayers as contrasted with non-taxpayers. Suits brought by taxpayers necessarily involve the validity of the federal tax assessment, and hence "arise under" the federal revenue laws. Federal district courts therefore have had original jursidiction of all such actions under 28 U.S.C., §1340, and its predecessors. However, where, as here, the plaintiff is a non-taxpayer, the case turns solely on property rights created under state law, and in no sense "arises under" federal law. Thus, as *Johnston* held, in the case at bar the County's suit *had* to be brought originally in the state court. The federal courts could assume jurisdiction only if the defendant District Director exercised his right of removal under 28 U.S.C., §1442(a)(1).

The decision in the court below thus creates a direct conflict between the Circuit Courts on an important jurisdictional question which only this Court can resolve, and which, in fairness to the County, should be certified by

this Court. For, if as we believe, *Johnston* was correctly decided, then the effect of the determination below is utterly to deprive the County of *any* forum in which its claim could have been litigated!

III.

Congressional enactment pendente lite of federal jurisdiction of such actions and authorization of substitution of the United States as a party defendant, rendered any concept of derivative jurisdiction inapplicable herein.

That Congress never could have intended that a plaintiff in the County's position was utterly without remedy is further demonstrated by the enactment in 1966 of 26 U.S.C., §7426, wherein Congress for the first time provided that suits such as the one at bar could be maintained directly against the United States in the federal courts.

As we have seen, prior to 1966 non-taxpayers whose property had been seized and covered into the Treasury in order to satisfy another's tax liability could maintain a common law action but *only* against the District Director. By enacting 26 U.S.C., §7426, Congress finally interred the anomalous relic of the presence as a defendant of the District Director. The statute permits third persons who claim an interest in or lien on property levied upon, to bring a civil action against the United States, regardless of whether the property has been surrendered to or sold by the District Director, and if "the court determines that such property has been wrongfully levied upon, the court may . . . grant a judgment for the amount of money levied upon" (§7426(a) and (b)(2)(B)).

Subsection (d) provides that "no action may be *maintained* against [the District Director or former District Director] with respect to any acts for which an action could have been maintained under this section"; and subsection (e) states that if any action which could be brought against the United States thereunder is "improperly brought" against the officer or former officer, the court "shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee *as of the time such action was commenced* upon proper service of process on the United States." (Emphasis added.)

The Court below held that the 1966 statute was of no avail to the plaintiff. The Court reasoned that since the right to sue the United States thereunder was limited to the federal district courts, the derivative jurisdiction rule of *Lambert* was applicable to any claim asserted by the County under 26 U.S.C., §7426 (App. A, p. 18a). We submit that the Court below erred for the following reasons.

Although the waiver of sovereign immunity embodied in §7426(a)(1) was limited to the federal courts, clearly the statute is applicable where, as here, an action had been instituted against the District Director in the state courts prior to 1966, and was pending on removal in the federal courts as of the effective date of the statute.

The *Lambert* rule has been criticized as indefensible from the point of practical judicial administration. 1A *Moore's Federal Practice* (2d Ed. 1965), p. 86-87. The concept of derivative removal jurisdiction is especially anomalous when applied to cases removed to the federal courts under §1442(a)(1). In those cases,

the removal option expresses one overriding federal policy—when a suit in a state court against a federal officer exposes him to civil or criminal liability for acts performed in his official capacity, he is entitled to have the merits of the claim resolved in a federal forum. Once that objective has been fulfilled by the removal, it seems anomalous, to say the least, to hold that the federal court must dismiss the action for want of jurisdiction, even where the action is such that the federal courts would have had original jurisdiction over the subject matter.

The enactment of 26 U.S.C., §7426 during the pendency of this case renders application of *Lambert* wholly indefensible. Here, Congress has created a new and independent basis for original federal court jurisdiction that was nonexistent when this suit was instituted, and when it was removed by the District Director under §1442(a)(1). To hold, as did the Court below, that the case nevertheless must be dismissed for want of jurisdiction renders the *Lambert* rule not only anomalous but palpably unjust.

Here, as in *Moore Ice Cream Co.* v. *Rose, supra,* "a fine sense of honor has brought the statute into being," and the Act should be applied "in a kindred spirit" (289 U.S. at 379). Implementation of that approach requires that the case at bar be held beyond the pale of *Lambert.* In that regard, we note that in the case at bar, the District Director first invoked 26 U.S.C., §7426; whereupon the County amended the Third Count of its complaint in order to make it conform to the very prayer contained in the District Director's answer thereto (App. G, p. 103a).

IV.

As to the merits of the controversy, which depended solely upon state law, the Court below decided important questions of New Jersey law contrary to the applicable decisions of the New Jersey Supreme Court. Specifically, the Court below erred in reversing the District Court's determination that under New Jersey law the County was entitled to prevail once it becomes clear that the money in suit was both a product of gambling and used by Moriarty as a bank for his continuing gambling operations—all of which was expressly found by the District Court upon abundant evidence.

It is well settled that state law, and not federal law, must control in determining whether or not any property rights existed in Moriarty in the $2,438,110, to which any federal lien might attach. *Aquilino* v. *United States,* 363 U.S. 509 (1960); *United States* v. *Durham Lumber Co.,* 363 U.S. 522 (1960).

Both opinions rendered in the Court below, insofar as they dealt with the merits of the County's substantive claim, conflict with *Aquilino* and *Durham Lumber,* because the opinions below construe the New Jersey forfeiture statute, N.J.S. 2A:152-6, in a manner that is completely at variance with the applicable decisions of the New Jersey Supreme Court. Thus, the Court below, in reversing the District Court's holding that the $2.4 million were subject to forfeiture under New Jersey law, has decided important state questions in a manner in conflict with applicable state law.

The basic issues tried in the case at bar was whether under state law, Moriarty had "property" or "rights to property" in the $2.4 million on July 5, 1962 to which a

federal tax lien could attach. Accordingly, the District Court did not decide this case until after the New Jersey Supreme Court had rendered its opinion in the related case of *Farley* v. *$168,400.97,* 55 N.J. 31 (1969) (App. D, p. 50a). The District Court observed that under New Jersey law, as authoritatively pronounced by the New Jersey Supreme Court in *Spagnuolo* v. *Bonnet,* 16 N.J. 546 (1954), and reaffirmed in *Farley* v. *$168,400.97, supra,* the forfeiture of gambling contraband occurs and is complete upon the commission of the offense (which in this case admittedly could not have been later than February 20, 1962, when Moriarty was arrested and put out of business). The District Court then held that Moriarty's title to the $2.4 million had been divested and forfeited to the County of Hudson prior to the effective date of the Federal tax lien (App. B, p. 38a).

The District Court's holding was based upon two findings of fact, either of which would have been sufficient in the Court's view of New Jersey law to sustain the forfeiture: (a) the money was wholly the product or proceeds of Moriarty's illegal numbers operation—a fact which the Government's witnesses never disputed and (b) that the $2.4 million was needed by Moriarty as a "bank" to carry on his business (App. B, 37a-38a).

The opinions rendered in the Court of Appeals reflect a material divergence of views on this phase of the case. Judge McLaughlin held that there was no "legitimate evidence that the money was "the result of a gambling operation" (App. A, 16a) and that there was "no evidence introduced which would honestly indicate any sort of a *current* gambling operation was at all connected with the money in suit" (*Id,* at 17a). Presumably therefore, in his view, the action should have been dismissed

on the merits even if subject matter jurisdiction were present in the Court below.

The opinion of Judge Adams, in which Judge Ganey concurred, agreed with the Government's legal contention —that the proceeds of an illegal gambling operation are not forfeitable on that account alone under state law but that the County had to show that they were used by Moriarty in his numbers business. However, Judge Adams did not view the District Court's opinion as embodying a "finding" that the money was needed by Moriarty or available for use by him as the "bank" for his lottery business (App. A, p. 30a). He then stated that the evidence on this point was conflicting, and from his view of the printed record, he could not say that either side should prevail as a matter of law. Judge Adams therefore concluded that if jurisdiction were present, he would have remanded the case to the District Court for further findings of fact concerning Moriarty's use of the $2.4 million (*Ibid*).

Petitioner submits that on this phase of the case the Court below erred in several important respects.

(a). The District Judge's holding that the proceeds or product of gambling are subject to forfeiture under New Jersey law was eminently sound in view of *Farley* v. *$168,400.97, supra.* The holding of the New Jersey Supreme Court in *Farley* v. *$168,400.97, supra,* which reaffirmed *Spagnuolo* v. *Bonnet, supra,* that the divestiture of the gambler's title under N.J.S. 2A:152-6 occurred *eo instanti* at the time the moneys were wrongfully used (App. D, pp. 60a to 63a), necessarily leads to that conclusion. For, as the New Jersey Supreme Court held, Moriarty's title to money which came into his hands as a result of his numbers operation was thereupon immediately for-

feited. It follows therefrom that his subsequent non-use of the money could not operate to defeat the forfeiture, especially where, as here the money was found secreted in the trunk of an automobile parked in a garage, rented by Moriarty and located in close proximity to the garage from which he was running his numbers operation on the occasion of his last arrest and where, as here, at the time the moneys were discovered, no rights of third parties had intervened. See also, *State* v. *Link, supra,* (14 N.J. 446, 102 A.2d 609).

(b). Moreover, the opinion below per Judge McLaughlin held that the County had to prove that the $2.4 million was "the result of a gambling operation . . . an impossible task as to which there was no legitimate evidence" (App. A, p. 16a). However, as pointed out above, both sides including the Government's witnesses, admitted that the money was wholly the product of Moriarty's gambling operation (p. 11, *supra*). The appellate court in thus reversing the trial court's finding on *undisputed* evidence, has so far departed from the accepted and usual course of appellate judicial proceedings as to call for the exercise of this Court's power of supervision.

(c). The opinion of Judge McLaughlin below also states that there was "no evidence" to "indicate that any sort of a current gambling operation was at all connected with the money in suit" (17a). That statement likewise conflicted with the applicable decisions of the New Jersey Supreme Court on an important question of state law. For, in *State* v. *Link* and *Farley* v. *$168,400.97,* both *supra,* the gambling operations had terminated months before the moneys were found; yet in both cases the forfeitures were affirmed by the New Jersey Supreme Court. Thus, in the case at bar, there was no need for the County to

prove that the money were connected with a "current" gambling operation, *i.e.*, one existing as of July 3, 1962, when the money was found.

(d). Finally, assuming *arguendo* that under state law the County had to adduce evidence that the $2.4 million was used by Moriarty in connection with his multi-million dollar lottery business, cogent testimony was introduced by the County that the $2.4 million was Moriarty's "bank" (App. A, p. 30a). As to this factual issue, the District Court's opinion states (App. B, pp. 37-38):

> "The proofs at trial showed that the currency here in issue had been in Moriarty's possession immediately prior to his incarceration for the possession of lottery slips, and that Moriarty's sole occupation was operating a 'numbers racket,' in Jersey City. While the court finds that, on occasion, a 'bank' larger than $168,400.97 would have been needed by Moriarty to carry on his wagering business, and that, therefore, the $2,438,110 was needed by Moriarty in the carrying on of his business,[3*] such a finding is unnecessary, as it is clear that the currency found was wholly the 'product' of a gambling operation."

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* The Court's footnote reads:

> "[3] The testimony at trial, adduced through various Internal Revenue Service agents, indicated that Moriarty employed between 124 and 140 runners in his gambling operation, and that daily play ranged from $30,000 to $61,000, with the average daily play totalling approximately $40,000. An agent familiar with this type of gambling operation also testified that Moriarty was a sole operator, and that his operation was the largest he had ever come across. Moriarty's payoff on a numbers hit was 600-1."

Thus, faced with conflicting expert testimony as to whether Moriarty in fact needed the $2.4 million in connection with the carrying on of his gambling operation, the trial judge credited the evidence adduced by the County. The District Court's further observation that the finding which he had just made was "unnecessary", does not alter the nature of the preceding finding. Rather, it merely reflected his view that under the New Jersey law it was sufficient for the County to prove that the money was "wholly the 'product' of a gambling operation."

We therefore submit that the concurring opinion (which expresses the views of the majority of the panel in the Court below on this point), erred in stating that if subject matter jurisdiction were present, the cause should be remanded to the District Court. A determination on the threshold question of jurisdiction favorable to the County would require the judgment entered in the Court below to be reversed and the judgment entered in the District Court to be affirmed.

V.

The Court below erred in holding that a New Jersey limitation statute, which was never pleaded in the trial Court, barred the County's substantive claim for forfeiture.

The opinion of Judge McLaughlin below also held that N.J.S. 2A:14-10, which provides for a one-year limitation on the commencement of "actions at law brought for any forfeiture upon any penal statute" barred the County from claiming that the money in suit was contraband under New Jersey law (App. A, p. 17a). We submit that

the holding was manifestly erroneous for the following reasons:

(a) The cited limitations statute was raised by the Government for the first time on appeal. Limitations was never pleaded as a defense to the County's claim; nor was it mentioned at any time during the trial. Rule 8(c) of the Federal Rules of Civil Procedure provides that the statute of limitations is an affirmative defense and must be pleaded. Therefore, the Court of Appeals should have refused to even consider the Government's argument based on that statute. *Badway* v. *United States,* 367 F.2d 22 (1st Cir. 1966).

(b) The statute plainly would not be applied by the New Jersey Supreme Court to cases involving the forfeiture of gambling contraband under N.J.S. 2A:152-6 in view, among other things, of the fact that the New Jersey courts have consistently held that forfeitures thereunder are absolute—the statutory transfer of title occurs prior to seizure, and the forfeiture in no way depends upon seizure. See *Farley* v. *$168,400.97, supra* (App. D, pp. 65a and 66a).

(c) Even assuming *arguendo* the limitations statute were applicable to forfeitures arising under N.J.S. 2A: 152-6, it would be of no avail to the defendants herein. It is well settled that the defense of the statute of limitations is a personal privilege. This defense could have been exercised only by Moriarty at his option. *Central Hanover Bank & Trust Co.* v. *U. S. Traction Co.,* 95 F. 2d 50 (2d Cir., 1938). Here Moriarty defaulted in answering the complaint and supplemental complaints, and thereby admitted that the moneys were contraband. *Spagnuolo* v. *Bonnet, supra* (16 N. J. at 559).

(d) Finally, as noted above, the County's substantive claim was based, in part, on the factual contention that the money in suit was used by Moriarty as the bank for his illegal numbers operation. Since Moriarty conducted his numbers business until February 19, 1962, and this suit was instituted in September, 1962, it is clear that in no event would the one-year limitation statute have barred this action.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM F. KELLY, JR.
Hudson County Counsel
By ISADORE GLAUBERMAN
Counsel for Petitioners.

71-1540

Supreme Court, U. S.
FILED
MAY 26 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JOSEPH STAPLETON, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110), and ALL PERSONS INTERESTED THEREIN,

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,287

JOSEPH STAPLETON, Treasurer of the County of Hudson, and COUNTY OF HUDSON,

v.

TWO MILLION, FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00) and all persons interested therein,

UNITED STATES OF AMERICA,

Appellant.

(D. C. Civil Action No. 819-62)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix A

Present:

McLaughlin, Ganey and Adams,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 22, 1970, be, and the same is hereby reversed and the complaint, supplemental complaint and amendments thereto are dismissed in accordance with the opinion of this Court.

Attest:

M. Elizabeth Ferguson
Chief Deputy Clerk

January 25, 1972

Appendix A

Order of United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,287

JOSEPH STAPLETON, Treasurer of the County of Hudson, and COUNTY OF HUDSON,

Plaintiffs-Appellees,

v.

TWO MILLION, FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00) and all persons interested therein,

UNITED STATES OF AMERICA,

Appellant.

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*, MCLAUGHLIN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges*

Appendix A

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(Sgd.) ARLIN M. ADAMS
Judge

Dated: February 28, 1972

Appendix A

Opinion of the United States Court of Appeals

(Filed—January 25, 1972)

454 F. 2d 1210 (1972)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,287

JOSEPH STAPLETON, Treasurer of the County of Hudson, and COUNTY OF HUDSON,

Plaintiffs-Appellees,

v.

TWO MILLION, FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00) and all persons interested therein,

UNITED STATES OF AMERICA,

Appellant.

(D. C. Civil Action No. 819-62)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 5, 1971

Before McLAUGHLIN, GANEY and ADAMS, *Circuit Judges*

Appendix A

McLaughlin, *Circuit Judge.*

This is an appeal by the United States Government from a district court's decision awarding $2,438,110 to Hudson County, New Jersey. It is conceded that the money in question was the property of one Joseph V. Moriarty. Appellant maintains that the district court did not have jurisdiction to pass upon this case and should have dismissed it.

On July 3, 1962 some workmen were renovating private garages on Oxford Avenue, Jersey City, N. J. While so engaged they discovered $2,438,110 in the trunk of a 1947 Plymouth automobile parked in garage #48. Various other articles pertaining to Joseph V. Moriarty were also found in the garage. The F.B.I. was called to the scene and agents from that department took initial control of the money. On July 5, 1962 the District Director of Internal Revenue made a jeopardy assessment against Moriarty for income tax and interest due in the amount of $3,395,-655.33. On July 9, 1962 the Government's notice of lien was filed in the Hudson County Register's Office and a notice of levy was served on the United States Marshal who had custody of the currency. On July 16, 1962 the money was turned over to the Internal Revenue Department by the United States Marshal and deposited in the National State Bank of Newark, New Jersey which is the depository for Internal Revenue collections for New Jersey. Within twenty-four hours the said funds were credited to the account of the Secretary of the Treasury in the Federal Reserve Bank of New York and thus covered into the United States Treasury.

On September 24, 1962, Hudson County filed a complaint in the Superior Court of New Jersey, Law Division,

Appendix A

Hudson County, seeking a judgment that the money be forfeited to the County of Hudson by reason of its being contraband pursuant to N. J. Stat. Ann. §2A:152-9.[1] The complaint named Chris L. Gross, the District Director of Internal Revenue, as one of the claimants to the fund, by reason of the fact that he had served a notice of levy on the Prosecutor of Hudson County, claiming a lien on all property owned by Moriarty.

On October 16, 1962 Mr. Gross filed a petition for removal in the United States District Court for the District

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[1] "2A:152-9. Disposition, on conviction, of money seeized; order of forfeiture

"If the trial or other ultimate disposition of such charge or charges, indictment or indictments result in a record of conviction being entered against the person or persons so arrested as aforesaid, *in connection with which arrest the said money, currency or cash was seized* or captured, as aforesaid, *then the county treasurer may*, after 6 months from the date of the record of the entry of such conviction, make application, without prior notice to the county court for an order to show cause why such money, currency or cash so seized or captured, shall not be forfeited to the sole use and gain of the county; such order to show cause shall then be served upon the person from whom said money, currency or cash was so seized or captured, in accordance with the rules of practice and procedure. Upon the return of the said order, hearing shall be conducted in summary manner, and at such hearing *proof of the conviction shall be prima facie evidence that the money, currency or cash so seized or captured was used in connection with the unlawful playing of any game wherein money or other thing of value is wagered or gambled; provided, however, that proof, to the satisfaction of the court, shall first be established that no action or proceeding, then pending and undetermined, has been filed in any court of competent jurisdiction against said county treasurer seeking a recovery or return of the money, currency or cash so held in custody.*" (Emphasis supplied.)

of New Jersey pursuant to 28 U.S.C. §1442(a)(1)[2] on the grounds that the proceeding in the state court was an action commenced against an officer of the United States for an act performed under color of office. The suit was so removed. Hudson County tried to have the litigation remanded to the state court. That motion was denied on April 3, 1963. Thereafter, on February 17, 1964, the County filed a supplemental complaint and subsequently filed amendments to that supplemental complaint, one of which substituted the United States as a party defendant. The trial judge found that Hudson County was entitled to the money. The United States appeals from that decision.

Admittedly, the suit was originally commenced in the Superior Court of New Jersey and later removed to the Federal District Court. The jurisdiction of the federal court over a cause removed from the state courts is derived from the question of the state court's jurisdiction; if the state court lacked jurisdiction of subject matter or parties, then the federal court acquires none, even though it might have jurisdiction in a like claim first brought in the federal system. See Lambert Co. v. Baltimore & Ohio R.R. Co., 258 U. S. 377 (1922); A. J. Curtis and Company v. D. W. Falls, Inc., 305 F. 2d 811 (3rd Cir. 1962);

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[2] "28 U.S.C. §1442(a)(1) Federal officers sued or prosecuted

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district division embracing the place wherein it is pending

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

Minnesota v. United States, 305 U. S. 382 (1939). Therefore the problem which must be resolved is, did the Superior Court of New Jersey have jurisdiction over this claim prior to it being removed to the federal court?

The money involved was taken by agents of the Federal Bureau of Investigation to be counted and remained in charge of federal officials until it was ultimately deposited in the Treasury of the United States. At no time in fact or in law did state or local officers possess custody or control of the currency; the state court simply never did have jurisdiction over the subject matter. The situation before us is in no way similar to United States v. Bleasby, 257 F. 2d 278 (3rd Cir. 1958) where county officials seized money used in gambling, as contraband and maintained possession of it. The holding there was that the New Jersey court had possession over the res and exerted valid in rem jurisdiction which could not be collaterally attacked by the United States in its effort to establish priority for its tax lien. Under the facts here the said money was never in the control of County or State officials.

The district court in its opinion claimed in personam jurisdiction to decide this litigation stating "However, this Court is not convinced that this suit is merely an in rem action erroneously commenced. To the contrary, there is strong reason to believe that this suit is purely an in personam matter seeking to determine the rightful owner of money found in the Jersey City garage. United States v. Klein, 303 U. S. 276 (1937) holds that a State has a right to adjudicate the title to a fund in possession of the United States Treasury on an in personam basis. Such an adjudication could only designate the rightful claimants to the fund, but could not control its distribution."

Based upon that erroneous reasoning the district court concluded that under the authority of the Klein opinion, supra, a state court has the right to determine the ownership of funds in the possession of the United States Treasury, even though that court could not order a government official to deliver possession of the funds to anyone. In that situation the prevailing party would have to go to a federal court for enforcement of the decree. The truth is that what Klein establishes is that a state court may determine rights to property on an in personam basis only where the United States has custody of the funds *as a mere stakeholder* and that the state court lacks the power to act where the United States claims an interest in the property at issue.

Klein dealt with the constitutionality of certain statutes of the Commonwealth of Pennsylvania purporting to confer jurisdiction on a state tribunal to declare the escheat of money deposited in the registry of the federal court and later covered into the Treasury of the United States. The circumstances surrounding that claim are as follows: The District Court for the Eastern District of Pennsylvania found that certain bondholders were entitled to specific sums. All monies due bondholders who could not be located were paid into the registry of the court. Five years later all unclaimed sums were transferred to the United States Treasury. The Escheator of the Commonwealth of Pennsylvania sought to escheat these funds and so petitioned the district court. The court dismissed the petition without prejudice on the grounds that petitioner had not yet procured a declaration of escheat, which was necessary to perfect the Commonwealth's title, and that the district court was without jurisdiction to make such a declaration. Thereafter an action was begun in the Court

of Common Pleas praying a declaration that the fund had escheated to the Commonwealth. Eventually the court entered a decree of escheat and directed the Escheater to apply to the United States District Court for an order that the monies be paid him as Escheator. This decision was affirmed by the Pennsylvania Supreme Court. The Supreme Court of the United States also affirmed this decision in United States v. Klein, 303 U. S. 276 (1937).

In that opinion Justice Stone writing for the Court carefully noted that "The Government does not, in pleading or argument, set up any right, title or interest in the present fund adverse to the unknown bondholders. It does not contend that the fund has been or can be escheated to the United States." United States v. Klein, supra, at p. 280. He went on to say: "The present decree for escheat of the fund is not founded on possession and does not disturb or purport to affect the Treasury's possession of the fund or the District Court's authority over it. Nor could it do so . . . At most the decree of the state court purports to be an adjudication upon the title of the unknown claimants in the fund by a proceeding in the nature of an inquest of office as in the case of escheated lands, . . . and to confirm the authority of appellee to make claim to the money." United States v. Klein, supra, at p. 282.

The facts before us are wholly distinguishable from those in United States v. Klein. The vitally important distinction between the two is that the Government had no claim to the money in the Klein action. It was merely a stakeholder waiting for the owner to appear. Since the funds were not claimed, the money could escheat to the state though it was in the United States Treasury. The

money in this appeal is in the United States Treasury but the Government is not holding it as a stakeholder but as owner thereof by reason of having taken possession of it in satisfaction for taxes due. It is settled law that a suit directly concerning the title to property in which the United States has an interest is a suit against the sovereign which absent the consent of the sovereign, cannot be maintained in the state court. In comparable circumstances Chief Judge Biggs held for this court, that "It is settled that a suit directly involving the title of property in which the United States claims an interest is a suit against the sovereign.. Hence the suit in the Court of Common Pleas is against the sovereign, the United States. But since the sovereign has not consented to be sued in the Pennsylvania tribunal that Court lacks jurisdiction or the power to adjudicate the issues presented." In Re Escheat of Monies Deposited in United States District Court, 187 F. 2d 131, 135 (3rd Cir. 1950), footnotes including great number of supporting cases, omitted.

Appellee contends that the filing of the supplemental complaint and subsequent amendments by the County gave the Federal Court jurisdiction of the litigation and the parties, irrespective of whether the state court from which it had been removed had jurisdiction. In support of this theory Freeman v. Bee Machine Co., 319 U. S. 448 (1943) is cited as holding that the District Courts have, after removal "the full arsenal of authority with which they have been endowed." Freeman v. Bee Machine Co., supra at 452. Appellant omits the all important difference between Freeman and this appeal. In Freeman, the State Court, before the removal of the case to the federal system, had proper jurisdiction. In fact that court held that "Congress has indeed provided that in a suit which has been removed

the District Court shall 'proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal.' Judicial Code §38, 28 U.S.C. §81. While that section does not cure jurisdictional defects present in the state court action, it preserves to the Federal District Courts the full arsenal of authority with which they have been endowed." Freeman v. Bee Machine Co., 319 U. S. 448, 452 (1943). It is obvious from the above that before the district court can allow the filing of amendments and supplemental complaints it must have jurisdiction, and the filing of these does not remedy any defect in the state court's jurisdiction prior to removal. There is no authority in the federal court to permit appellee, under the guise of filing an amended petition, to eliminate the patent jurisdictional defects of the state court action. See Henderson v. Shell Oil Co., 173 F. 2d 840 (8th Cir. 1949). Since the state court concededly lacked jurisdiction, the District Court could acquire none on removal and this claim should have been dismissed.

A second major error appears in the disposal of this claim by awarding the currency to Hudson County. The two statutes controlling the forfeiture of funds in this type of case are N.J.S.A. 2A:152-6[3] and N.J.S.A. 2A:152-

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[3] "2A:152-6. Destruction of gaming apparatus

"Whenever any furniture, implement, device or machine, made or used for the purpose of gambling or for the playing of any game wherein money or other thing of value is wagered or gambled, shall be seized or captured by the police, constabulary or other officer, the prosecutor of the county where such seizure is made

(Footnote continued on following page)

7.[4] Hudson County founded its alleged right on the former statute. It had previously been held that N.J.S.A.

(Footnote continued from preceding page)
shall have the same destroyed or rendered useless for the uses and purposes aforesaid, and it shall be unlawful to return them to the person or persons owning the same, or to any other person; provided, it shall be lawful for the prosecutor in his discretion and subject to rules and regulations which may be promulgated by the attorney general, to donate and deliver such of them as may be used for lawful purposes to any institution located within the county where such seizure is made and which is under the control and operation of the federal government, or to any institution, wherever located, which is under the control and operation of the state of New Jersey or any political subdivision thereof, or to any institution located within the county where such seizure is made and which is under the control and operation of any public, semipublic, or private, charitable, religious or philanthropic institution or organization.

"The attorney general shall have authority to make, amend and repeal, from time to time, such rules and regulations as he may, in the public interest, deem necessary, to assure an orderly procedure and reasonable uniformity in the disposition of such property, in accordance with the provisions hereof, in the several counties."

[4] "2A:152-7. Money seized on arrest for playing unlawful games; return prohibited; exceptions

"Whenever any money, currency or cash shall be seized or captured by the police, constabulary or other officer in connection with any arrest for violation of or conspiracy to violate any gambling law of this state, the said money, currency or cash shall be deemed prima facie to be contraband of law as a gambling device, or as part of a gambling operation, and it shall be unlawful to return the said money, currency or cash to the person or persons claiming to own the same, or to any other person, except in the circumstances and manner hereinafter provided."

2A:152-6 was applicable to money where it had been earmarked and segregated as part of a gambling operation, such money constituted a gambling device and was contraband. See Spagnuolo v. Bonnett, 16 N. J. 546, 109 A. 2d 623 (1954). While N.J.S.A. 2A:152-7 is primarily concerned with the seizure of currency, property of that sort when seized in connection with an arrest will be deemed prima facie to be contraband of law as a gambling device. Thus that statute so establishes a presumption that the money is contraband, a presumption which must be overcome by a contesting party. N.J.S.A. 2A:152-6 does not deal with any such presumption. The District Court, on plaintiff's urging, held that the County was entitled to the benefits of N.J.S.A. 2A:152-7 with the above described presumption which was not rightfully in this litigation at all. This entire claim depended solely upon N.J.S.A. 2A:152-6 which would have correctly forced Hudson County to prove that the money was an implement or device made or used for the purpose of gambling. There was no acceptable proof to that effect offered by this plaintiff.

A statute creating a forfeiture is penal in nature and must be strictly construed. See State v. La Bella, 88 N. J. Super. 330, 212 A. 2d 192 (1965). The New Jersey Supreme Court in a case dealing with the construction of Section 2A:152-7 has held that the arrest need not occur simultaneously with seizure for there to be a forfeiture of gambling funds. See State v. Link, 14 N. J. 446 (1954). It has also held that the forfeiture occurred at the time *the monies were wrongfully used* and not at the time of seizure. See Spagnuolo v. Bonnett, 16 N. J. 546, 109 A. 2d 623 (1954). It has never been held that absent an arrest or seizure the presumption of Section 2A:152-7 is

applicable. In all published opinions concerning the application of this section there was seizure of money in connection with an arrest for violating the gambling statutes. In the appeal before us Moriarty was in jail at the time the money was found, nor was he subsequently arrested in connection with it. The money was not seized by local or state representatives, but taken by federal officials in connection with back taxes owed by Moriarty.

The $168,400.97 referred to by plaintiff, which was discovered later, was found in an entirely separate place where there was gambling paraphernalia pertaining to it and linking Moriarty with it. Moriarty pleaded guilty to possession of lottery slips in connection with that money. At no time ever was there any connection shown between the $2,438,110 and a gambling operation nor was there any arrest made in connection with it. It follows that N.J.S.A. 2A:152-7 cannot be applied to the suit money. In this strange litigation, the ostensible plaintiff, Hudson County, should have been denied any presumption that the currency in dispute was the result of a gambling operation and should have been forced to so prove it, an impossible task as to which there was no legitimate evidence.

The money as said was accidentally found by workmen. In addition to it the garage also contained the following: $10,000 in United States Savings Bonds; 20 shares of stock in the Radio Corporation of America; bank records in the name of George B. Smith; a $25 savings bond issued to Ellen Mary Moriarty or Joseph Moriarty; various bank accounts pass books in the name of Joseph Moriarty and personal papers of Moriarty. There was nothing in the garage less than six years old at the time of the discovery and most of the material was between 10 and 20 years old. Even the wrapping on the bills making up the

$2,439,110 showed that those bills dated from about 1951. The lack of gambling paraphernalia in the garage was conspicuously noticeable. There was no evidence introduced which would honestly indicate that any sort of a current gambling operation was at all connected with the money in suit.

The contention that this money is a product of gambling and subject to forfeiture is clearly wrong under the New Jersey statute of limitations on forfeitures, N.J.S.A. 2A:14-10 which provides:

> "2A:14-10 2 years and 1 year; action on penal statute
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> All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed:
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> d. Within 1 year next after the offense committed or to be committed against the statute, when the forfeiture is or shall be limited by the statute to any county * * * or to any officer of such county * * *."

The wording of this statute makes it very plain that the legislature intended that property be forfeited to the county only on a showing that it had been used in the conduct of an illegal act within one year prior to the commencement of the action. If property derived from gambling was forfeited without regard to the date of the offense, this statute would be meaningless. The false theory that the property might possibly have been the product of an illegal act at some unknown time and at some unknown place which might have been anywhere will not

support a forfeiture. All the evidence in this appeal undeniably points to this money as having been in Moriarty's possession for years prior to the commencement of this suit. Whether by the wildest guess it might have been the product of a long past gambling operation is no honest legal reason for stripping the United States of the money which it is entitled to possess. A holding to the contrary would make Section 2A:14-10 void and meaningless.

Plaintiff also offers the pronouncement that the money was used by Moriarty as a bank for his gambling operation. The trial judge did not so find. The record is barren of legitimate evidence to that effect.

Finally, in appellee's shot gun approach the argument is made that jurisdiction existed under 26 U.S.C. 7426, which provides for a civil action in a United States District Court by persons other than taxpayers based on an interest in property wrongfully levied upon by the United States. That section was effective November 2, 1966. The bold attempt to assert that it should be applied retroactively does not touch the issue before us. The section limits jurisdiction to the federal courts, which means that a claim against the United States could only be asserted in the federal district court. A state court would lack jurisdiction over an action seeking relief under 26 U.S.C. 7426. Jurisdiction on removal is derivative in nature, it does not exist if the state court from which it was removed lacks jurisdiction. See Crow v. Wyoming Timber Products Co., 424 F. 2d 93 (10 Cir. 1970).

The United States never waived its right to question jurisdiction. Lack of subject matter jurisdiction may not be waived by the parties. Hospoder v. United States, 209

F. 2d 427, 429 (3rd Cir. 1954); Forgione v. United States, 202 F. 2d 249, 253 (3rd Cir. 1953), cert. denied, 345 U. S. 966 (1953). Moreover, where the United States (or one of its officers) is sued in a state court, removal by the Government is not tantamount to a consent to be sued nor a waiver of objection it may have to the jurisdiction of the removal court. Minnesota v. United States, 305 U. S. 382, 388-389 (1939). The district court improperly relied on DiFrischia v. New York Central Railroad Co., 279 F. 2d 141 (3rd Cir. 1960) in not permitting the United States to have the trial record note the unescapable fact that there was no jurisdiction in the district court to order the United States to give said money to this appellee. There is never foreclosure of bringing out the palpable lack of jurisdiction in the court. The latter itself should affirmatively so state. The district court cannot avoid declaring such lack as in this instance because it may or may not have been mentioned initially. In DiFrischia the court found a party bound by an admission as to a fact on which the diversity jurisdiction of the district court depended. In this litigation the question of jurisdiction was validly raised and the district court, for the above outlined reasons did not have jurisdiction.

In a last minute effort to bolster up appellee's position, the opinion in State of New Jersey v. Kaiser, United States District Court for the District of New Jersey, October 15, 1971, is now put forward on behalf of appellee. In that decision the money seized was affirmatively proven to be a part of a current gambling operation where betting slips were found indicating approximately $12,000 in gambling receipts for the very day of the seizure. Neither that opinion or the one in Farley v. $168,400.97, 55 N. J. 31, 259 A. 2d 201 (1969) can be twisted so as to justify appellee's position in this appeal.

The judgment of the district court will be reversed and the complaint, supplemental complaint and amendments thereto will be dismissed.

Judge Ganey concurs in the result of the Court opinion and with Judge Adams' concurrence.

ADAMS, *Concurring*:

Although I agree with the result reached by the majority, my views differ sufficiently to warrant a separate statement regarding the jurisdictional problem and the interpretation of the New Jersey forfeiture statute.

The dispute here centers on whether Hudson County, New Jersey or the United States is the rightful owner of the $2,438,110 found in garage #48 in Jersey City, New Jersey. Hudson County claims the money as a consequence of the operation of the New Jersey Forfeiture Statute, N. J. Stat. Ann. §2A:152-6 *et seq.*, whereas the United States asserts that the money is due it because of a valid tax lien, under 26 U.S.C. §6321, the Moriarty's failure to pay federal income tax.

A. The Jurisdictional Problem

Because Hudson County initiated this lawsuit in the state courts of New Jersey, and the suit is in federal court following removal by the original named defendant, our inquiry implicates the jurisdiction which the New Jersey court had over the original action. "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court

acquires none, although it might in a like suit originally brought there have had jurisdiction." Lambert Co. v. B. & O. R.R. Co., 258 U. S. 377, 382 (1922).

Neither at the trial court nor on appeal has either side discussed the possibility of jurisdiction based on 28 U.S.C. §2410. This statute becomes all the more relevant because of the majority's holding that jurisdiction was lacking because the United States had not consented to be sued. The relevant portion of section 2410 reads:

> "(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—
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> "(1) to quiet title to,
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> "(2) to foreclose a mortgage or other lien upon,
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> "(3) to partition,
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> "(4) to condemn, or
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> "(5) of interpleader or in the nature of interpleader with respect to real or personal property on which the United States has or claims a mortgage or other lien."

The United States clearly has consented to suit by third parties, in a state court, as well as in a district court, under the five listed categories.

The money in dispute is personal property and the United States claims a lien on the money based on 26

U.S.C. §6321.[1] If the nature of the claim to the money made by the Treasurer of Hudson County falls within one of the five categories, the New Jersey state court would have had jurisdiction over the original lawsuit and the District Court would have had jurisdiction after the removal.

We are presented with two problems of interpretation regarding section 2410. First, the District Director of the Internal Revenue Service was the named defendant in the action prior to its removal. It was not until January, 1969 that the United States was substituted for him as the defendant. While section 2410 authorizes an action *against the United States* to be commenced in the state courts, it is unclear whether the United States must be made a party at that time or whether naming an *officer of the United States* will suffice. *Compare* In re Escheat of Monies, 187 F. 2d 131, 135 (3d Cir. 1950), *with* First Nat'l. Bank of Emlenton v. United States, 265 F. 2d 297, 300 (1959). Because of the disposition of the jurisdictional question on other grounds, it is not necessary to express an opinion on this knoty problem.[2]

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[1] 26 U.S.C. §6321 reads:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

[2] Prior to the enactment of 26 U.S.C. §7426, actions against the District Director could be commenced by third parties in Federal Court only. *See,* H. Rep. No. 1884, 89th Cong., 2d Sess., 27 (1966).

The second question regarding jurisdiction is whether the action by Hudson is one of those for which Congress expressed the intent as in section 2410, to waive the sovereign immunity of the United States. It appears that the only provision that may be considered applicable is section 2410(a)(2), which would permit Hudson County to sue "to foreclose a mortgage or other lien upon" monies on which the United States claims a lien. That the United States claims the $2,438,110 by a lien is manifest from the record and from the language of 26 U.S.C. §6321. It is not all clear, however, that Hudson County is attempting to foreclose a mortgage or a lien, or that Congress intended to waive the sovereign immunity of the United States when there is a suit by a state to enforce a forfeiture.

Throughout this litigation, Hudson County has asserted that it is entitled to the money because of N. J. Stat. Ann. §2A:152-6 *et seq.*, and that the money has been forfeited to it. N. J. Stat. Ann. §2A:152-9 never speaks in terms of the creation of a *lien* in favor of a county whenever money is seized in connection with a gambling operation, rather it states that "the county treasurer may * * * make application * * * to the county court for an order to show cause why such money * * * shall not be forfeited * * *." Therefore, because Hudson County's action is not one "to foreclose a * * * lien," it would be possible, on this basis alone, to hold that section 2410 does not authorize this suit to be brought in state court.

The legislative history of section 2410 and its predecessors makes even more apparent that Congress did not provide that a suit might be filed in a state court against the United States for a forfeiture proceeding.

> "This legislation has been recommended * * * to relieve against the injustice with which mortgages are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances, the mortgagee finds himself at an impasse. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. * * *." H. R. Rep. No. 95, 71st Cong., 2d Sess. 1.

Thus it is clear that Section 2410 was enacted to protect innocent purchasers whose property was encumbered by a junior federal lien. Although, by judicial interpretation, section 2410 has been broadened to encompass suits by municipalities brought in state courts to foreclose their tax liens as against liens asserted by the United States, New York City v. Evigo Corp., 121 F. Supp. 748 (S. D. N. Y. 1954), no cases have been brought to our attention permitting such an action when a county has sought to enforce a forfeiture. A suit to enforce a forfeiture was not contemplated by Congress, and there would appear to be no compelling reason for so extending the scope of section 2410.[3]

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[3] Other courts have also adopted an approach narrowly construing this provision. *See e.g.,* Falik v. United States, 343 F. 2d 38 (2d Cir. 1965), Shaw v. United States, 321 F. Supp. 1269 (D. Vt. 1970), Johnson Service Co. v. H. S. Kaiser Co., 324 F. Supp. 745 (N. D. Ill. 1971).

B. Interpretation of New Jersey Forfeiture Law

Even assuming *arguendo* that a state court has jurisdiction to entertain a suit by a municipality against the United States to enforce a forfeiture, it is not clear that the District Court was correct in its interpretation of the applicable New Jersey law dealing with forfeiture. The original New Jersey forfeiture statute provides that "any furniture, implement, device or machine, made or used for the purpose of gambling" becomes the property of the county and is forfeited. N. J. Stat. Ann. §2A:152-6. Under this provision the contraband is forfeited at the moment of its illegal use, Farley v. $168,400.97, 55 N. J. 31 (1969). But the county has the burden of proving the illegal use before the forfeiture may be enforced. Krug v. Board of Chosen Freeholders, 3 N. J. Superior Ct. 22, 65 A. 2d 542 (App. Div. 1949). In 1942, the state legislature added provisions to the basic statute making it clear that the county, as opposed to the state, would be entitled to any seized money and creating the presumption that any money seized in connection with an arrest for violation of a gambling law was *prima facie* contraband and forfeit. N. J. Stat. Ann. §2A:152-7. *See* Farley v. $168,400.97, *supra*. Thus, depending on which provision is applicable, the county may or may not be required to establish affirmatively the connection between the seized money and the gambling operation.

The county asserts that it is entitled to the benefit of the presumption of section 152-7, and if it is not, that it has in any event proved the illegal use because the $2.4 million was used as the bank for Moriarty's numbers operation. The county relies heavily on Farley v. $168,400.97, *supra*, to support its position that the presumption applies here.

Appendix A

Farley arose out of the same events which precipitated the present lawsuit. Following the discovery of the $2.4 million in garage No. 48, the Jersey City Police Department entered garage No. 56, just down the street, and discovered the $168,400.97 along with gambling paraphernalia belonging to Moriarty. The dates on the seized lottery slips indicated that Moriarty had been operating a numbers game from December 14, 1961 to February 10, 1962. While he was serving his sentence for conviction of other gambling offenses, Moriarty was indicted for a series of violations. He pleaded guilty to possession of the seized lottery slips on various dates from December 14, 1961 to July 6, 1962. Upholding Hudson County's claim to the money against an asserted tax lien by the United States, the New Jersey Supreme Court held that the forfeiture contemplated by the New Jersey Statutes occurred at the time of the illegal use and did not await either actual seizure of the funds by the state or a judicial determination of forfeiture. The Court also held that the arrest for violation of gambling laws and the seizure of the funds need not be simultaneous.

Hudson County would view *Farley* as standing for the broad propositions that in order for the presumption of section 152-7 to become operable there need not be a seizure of the funds by State officials, and that any inferential link between the money and gambling is sufficient to make the money *prima facie* contraband. However, Hudson County's view of *Farley* overlooks several important considerations. In *Farley* it was beyond question that, based on the location of the $168,400.97, the money was used in the operation of Moriarty's numbers business. Further, because of Moriarty's plea of guilty to possession of the numbers slips, there was no doubt that the

money had in fact been seized in connection with an arrest for violation of gambling laws.

In the present case, the money was seized by agents of the F.B.I., not by state officials. Although it draws no distinction between seizures by one sovereign or the other, the presumption section was enacted in 1941 as part of a broad legislative scheme to simplify the procedure for determining claims to seized money. Farley v. $168,400.97, *supra*. N. J. Stat. Ann. §2A:152-8 states that pending the disposition of the money, it *shall* be deposited with the county treasurer.[4] It is difficult to imagine the purpose of this provision unless the legislature envisioned seizure by state officials in the first instance. Thus, it

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[4] One of the difficulties with this case is that both sides have tended to characterize it as a forfeiture proceeding. As contemplated by the New Jersey scheme, the action is basically *in rem*. Normally, an officer of a county will have seized the contraband money and have deposited it with the county treasurer. The county will then initiate a proceeding which states to the world that the money will be forfeited to the county unless someone can show a higher right to the money. Thus, in Farley v. $168,400.97, *supra*, the United States was required to appear in the New Jersey courts in order to assert its tax lien on the money.

The present action, on the other hand, is in a very different posture. The United States has seized the money pursuant to a lien, and Hudson County has sued the government in an attempt to put the money in the County treasury. The suit appears to be *in personam*—directly against the United States—and Hudson County relies on the New Jersey forfeiture laws as the basis for its cause of action, not as the form of the action. Because this lawsuit is not a forfeiture proceeding in the traditional sense, the applicability of the presumption section is highly questionable since it is a portion of a statute setting forth the procedures for enforcing a forfeiture.

would appear that the presumption section would be inapplicable for this reason alone.

Other reasons exist, however, to compel the conclusion that the presumption section is inapplicable in this case. Moriarty has never admitted that the $2,438,110 was used as part of his gambling operation. When this money was found in garage No. 48, no evidence of gambling was uncovered. The County has not pointed to any arrest in connection with which this money was siezed. The County asserts that the $2.4 million represents an accumulation of profits by Moriarty from his illegal business or that the money was used by him as the bank for his operation. The argument perhaps would continue that the money was seized in connection with any of Moriarty's numerous gambling arrests. It appears doubtful that any case interpreting the presumption section would permit the arrest to be unspecified. Moreover, the presumption section is penal in nature, and, as such, must be construed strictly. State v. LaBella, 88 N. J. Superior Ct. 330, 212 A. 2d 192 (1965). Logic would dictate then that the money must be seized in connection with a specific gambling arrest. Therefore, absent both a seizure by state officials and a reference to a particular arrest, the County should not have been given the advantage of section 152-7.

N. J. Stat. Ann. §2A:156-6,[5] on the other hand, requires neither actual arrest, nor seizure by state officials, to

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[5] Section 152-6 reads:

"Whenever any furniture, implement, device or machine made or used for the purpose of gambling or for the playing of any game

(Footnote continued on following page)

create a forfeiture. As noted above, section 152-6 does put the County to its proof that the money was used illegally. The County attempted to prove in the District Court that the money was employed as Moriarty's bank, and has asserted on appeal the reasonableness of that conclusion. Because it improperly relied on the presumption of section 152-7, the District Court never found, as a fact, that the money was used as Moriarty's bank. Rather it found the money to be "wholly the 'product' of a gambling operation," as distinguished from finding that it was "used for the purpose of gambling." The District Court's conclusion that money which is the *product* of gambling is subject to forfeiture appears to be contrary to New Jersey decisional law. In Krug v. Board of Chosen Freeholders, *supra*, 65 A. 2d at 543, the Court stated:

(Footnote continued from preceding page)

wherein money or other thing of value is wagered or gambled, shall be seized or captured by the police, constabulary or other officer, the prosecutor of the county where such seizure is made shall have the same destroyed or rendered useless for the uses and purposes aforesaid, and it shall be unlawful to return them to the person or persons owning the same, or to any other person; provided, it shall be lawful for the prosecutor, in his discretion and subject to rules and regulations which may be promulgated by the attorney general, to donate and deliver such of them as may be used for lawful purposes to any institution located within the county where such seizure is made and which is under the control and operation of the federal government, or to any institution, wherever located, which is under the control and operation of the state of New Jersey or any political subdivision thereof, or to any institution located within the county where such seizure is made and which is under the control and operation of any public, semipublic, or private, charitable, religious or philanthropic institution or organization."

> ". . . The money was seized on the theory that it was an integral part of the gambling operation and thus there attached to it the characteristic of a gambling device. Money as such is not ordinarily an instrument of gambling or subject to seizure and confiscation as such an instrument, but is generally the stake for which men gamble and, therefore, not subject to confiscation as a gambling device. Money may, however, become subject to such seizure where it has become an integral part of the gambling operation. . . .".

Therefore, money which represents nothing more than an accumulation of profits from gambling—"the stake for which men gamble"—is not to be forfeited under New Jersey law.

The only theory which would support the County's assertion that the money was forfeited is that the $2.4 million was used as the bank for Moriarty's operation. Testimony was introduced by the County to support this view and introduced by the United States to refute it. The District Court felt it unnecessary to make a finding on this point. Viewing only the printed record, I cannot say that, as a matter of law, either side should prevail on this issue. Thus, even if it were held that jurisdiction were present, I would be constrained to remand the case to the District Court for further findings of fact concerning the use of the $2.4 million.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Opinion of United States District Court for the District of New Jersey

(Filed—May 25, 1970.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 819-62

FRANK J. FARLEY, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Plaintiffs,

v.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110), and ALL PERSONS INTERESTED THEREIN,

Defendants.

COOLAHAN, District Judge:

In this action, the United States and the County of Hudson, New Jersey contest the ownership to $2,438,110, found by workmen on July 3, 1962, in the trunk of an old automobile in a garage, in which they were ordered to install a new overhead door. The garage [hereinafter Garage No. 48] is located at 127-131 Oxford Avenue in Jersey City, New Jersey. Subsequent to the finding of this

currency, on July 6, 1962, the Jersey City Police discovered $168,400.97 in a garage "in close proximity" to Garage No. 48.[1] As well as the currency, the police discovered assorted gambling paraphernalia. Both parties agree that the two sums belonged to Joseph V. Moriarity, the head of a "numbers racket" operated in Jersey City, whose criminal record regarding lottery violations dates back to the 1930's. At the time of these discoveries, Moriarity was serving a sentence in the New Jersey State Prison, imposed on March 2, 1962 upon a plea of guilty to a charge of possession of lottery slips. Two actions, one dealing with the $2,438,110 find and the other with the $168,400.97 find, were instituted by the above-named plaintiffs in the State Courts of New Jersey; both were removed to this court by the United States. Upon motions to remand in the two cases, this court remanded the suit involving the $168,400.97 to the State Courts for decision, *State* v. *Moriarity*, 268 F. Supp. 546 (D. N. J. 1967), and retained jurisdiction in the case at Bar.

The action involving the $168,400.97 was tried, and a judgment for the County of Hudson resulted, *Farley* v. *$168,400.97*, 97 N. J. Super. 458 (Law Div. 1967); that judgment was affirmed by the Appellate Division, 102 N. J. Super. 597 (App. Div. 1968), and by the New Jersey Supreme Court, —— N. J. —— (1969). A trial involving the case at Bar took place in January, 1969; decision was reserved pending the opinion of the New Jersey Supreme Court in *Farley* v. *$168,400.97*, and to permit the parties to submit proposed findings of fact and conclusions of law.

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[1] See *Farley* v. *$168,400.97*, —— N. J. —— (1969).

The United States bases its claim to this money on a jeopardy tax assessment and consequent federal tax lien against Moriarity, filed on July 5, 1962. The County of Hudson claims that at the time the lien took effect, the currency was no longer the property of Moriarity, but that title had already passed to the County, to which it was forfeit pursuant to N.J.S.A. 2A:152-6, as an "implement, device or machine, made or used for the purpose of gambling."

Initially, the United States claims that the court has no jurisdiction over this action, and that the complaint must, therefore, be dismissed, a position different from that advanced by the United States at the time of Plaintiff's Motion for Remand. The jurisdiction of this court to hear this matter was discussed in the opinion filed by this court on April 3, 1963, after argument on Plaintiffs' Motion for Remand; the United States will not be permitted to contend, at this posture of the case, that jurisdiction is lacking. See *DiFrischia* v. *New York Central R.R. Co.*, 279 F. 2d 141 (3d Cir. 1960).

The central question here, as it was in *Farley* v. *$168, 400.97* is whether Moriarity had "property" or "rights to property," crucial to the operation of 26 U.S.C. §6321, which creates the Federal tax lien. The question is one governed by State law. *Aquilino* v. *United States*, 363 U. S. 509 (1960). Stated differently, then, the court must decide if, at the time the federal tax lien took effect, the currency here in issue was the "property" of Moriarty, or whether it had already been made forfeit to the County of Hudson.

The United States first argues that the currency was not forfeit to the County of Hudson, because of the fail-

ure of the County to comply with the requirements of N.J. S.A. 2A:152-7, in that the County did not "seize" or gain "physical possession" of the money. From the opinion of the New Jersey Supreme Court in *Farley* v. *$168,400.97 supra,* it is clear that the forfeiture occurs at the time of the wrongful act, and does not depend on any physical seizure of the property. The Supreme Court said there that:

> We see no reason why the Legislature would want to delay the forfeiture until seizure or to make the forfeiture depend upon it. That construction was rejected in similar cases. So *United States* v. *Stowell, supra,* 133 U. S. at ——, 33 L. ed. at 560, held the statute's use with reference to offending articles of the phrases "wherever found" and "found in the distillery," did not express an intent to delay the forfeiture to the time when the articles were found. Again, *United States* v. *Pacific Finance Corp.,* 110 F. 2d 732 (2d Cir. 1940), held a statutory mandate that vehicles used for smuggling "shall be seized and forfeited" did not negate an intent to forfeit the vessel at the time of its illegal use. To the same effect is *United States* v. *One 6.5 Mannlicher-Carcano Military Rifle, etc.,* 250 F. Supp. 410 (N. D. Tex. 1966). But see *Stout* v. *Green,* 131 F. 2d 995 (9 Cir. 1942).
>
> It is true, of course, that forfeited property, if not seized, may never reach the hands of the condemning sovereign. That is equally true of the federal tax lien which may touch things of which the United States may never learn. But that is no reason to assume that either legislature in-

> tended the sovereign's interest to arise only when the property is actually in its grasp.

Here, at the time of the seizure, and *a fortiori* at the time the tax lien took effect, Moriarity's title to this money had been divested, and the money was forfeit to the County of Hudson if it was an "implement, device, or machine, made or used for the purpose of gambling." Under N.J.S.A. 2A:152-7,

> Whenever any money, currency or cash shall be seized or captured by the police, constabulary or other officer in connection with any arrest for violation of or conspiracy to violate any gambling law of this state, the said money, currency or cash shall be deemed prima facie to be contraband of law as a gambling device, or as part of a gambling operation . . .

The United States claims that this statute is not applicable to the case at Bar in that the seizure of the money was not "in connection with any arrest for violation of . . . any gambling law"; that there was no showing by the County that the "monies were connected with gambling operation"; and hence that the money is not forfeit and is subject to the tax lien. Under New Jersey law, however, the seizure need not be simultaneous with the arrest in order to be "in connection with any arrest." *State* v. *Link,* 14 N. J. 446 (1954). It appeared from the proofs submitted at trial that, on the very day the money was seized by agents of the Federal Bureau of Investigation, it was clear that it was Moriarity's money and that it was connected with Moriarity and his gambling operation, because of the various items belonging to and dealing with

Moriarity and his operation discovered in the garage along with the money. Furthermore, it was also shown at trial that Moriarity had a long record of convictions in the field of operating a lottery, and that he was incarcerated at the time of the discovery on a plea of guilty to a charge of possession of lottery slips. The court is convinced, therefore, that the seizure was "in connection with any arrest" as that term is used in the New Jersey statute.

An argument could also be made by the United States that, in order for a forfeiture to take place, the local police must "seize" the currency. The short answer to this has already been given; under the interpretation given in *Farley* v. *$168,400.97,* by the Supreme Court of New Jersey, the forfeiture takes place irrespective of any "seizure." Moreover, it may well be that the statute is meant to encompass seizures by federal officers as well as those by state officers, as long as the seizure is made in connection with a gambling arrest. In view of Moriarity's prior arrests by federal agents for conducting a gambling operation, see *United States* v. *Moriarity,* 327 F. 2d 245 (3d Cir. 1965), and the continued surveillance undertaken by federal agents in investigating Moriarity's wagering activities, it seems clear that the seizure by the F.B.I. of any money purportedly belonging to Moriarity would be "in connection" with a gambling arrest.

The court finds, therefore, that the County has shown that it is entitled to the benefits of N.J.S.A. 2A:152-7, with its presumption that the money so seized was "contraband as of law as a gambling device, or as part of a gambling operation." However, the United States argues that it has rebutted the presumption granted by the stat-

ute, and that it has shown that the "monies were not connected with a gambling operation." Initially, it should be noted that if the United States successfully carries its burden of proving this, the currency is not subject to forfeiture. See *McGill* v. *Essex County*, 87 N. J. Super. 367 (Law Div. 1965). The government's theory, however, seems to be that the currency is forfeit only if it is being used in a current gambling operation, as, for example, if it is being used as a "bank". It is clear from the Supreme Court's opinion in *Farley* v. *$168,400.97*, however, that the "product" of gambling activity is subject to seizure as well. From the rationale adopted by the Supreme Court, it appears that once currency has been obtained as the product of a gambling operation, it is contraband and is forfeit to the County, although there has been no seizure of the currency and no arrest of the gambler involved. The proofs at trial showed that the currency here in issue had been in Moriarity's possession immediately prior to his incarceration for the possession of lottery slips, and that Moriarity's sole occupation was operating a "numbers racket," in Jersey City.[2] While the court finds that, on occasion, a "bank" larger than $168,400.97 would have been needed by Moriarity to carry on his wagering business, and that, therefore, the $2,438,110 was needed by Moriarity in the carrying on of

[2] The United States at trial contended that Moriarity had other sources of income, such as mortgages and other investments. No competent proof was adduced on this question. Any possible doubt as to the source of Moriarity's income was dispelled, upon the showing that Moriarity had been arrested for taking or possessing lottery slips on at least 14 different occasions since 1950; arrests took place in 1950, 1951, 1954, 1956, 1959, 1960, 1961 and 1962.

his business,[3] such a finding is unnecessary, as it is clear that the currency found was wholly the "product" of a gambling operation. Even absent the presumption granted by statute, therefore, the County of Hudson has proven that the currency is contraband and forfeit.

It is obvious from the foregoing that any interest which Moriarity may have had in the currency found on July 3, 1962 was extinguished, and title to the currency had passed to the County of Hudson, prior to the effective date of the federal tax lien. Accordingly, judgment in this action should be for plaintiffs.

Let an appropriate order be submitted.

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[3] The testimony at trial, adduced through various Internal Revenue Service agents, indicated that Moriarity employed between 125 and 140 runners in his gambling operation, and that daily play ranged from $30,000 to $61,000, with the average daily play totalling approximately $40,000. An agent familiar with this type of gambling operation also testified that Moriarity was a sole operator, and that his operation was the largest he had ever come across. Moriarity's payoff on a numbers hit was 600-1.

APPENDIX C

Opinion of United States District Court for the District of New Jersey Denying Remand

(Filed—April 5, 1963.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 819-62

FRANK J. FARLEY, Treasurer of the County of Hudson and COUNTY OF HUDSON,

Plaintiffs,

vs.

TWO MILLION, FOUR HUNDRED THIRTY-EIGHT THOUSAND ONE HUNDRED AND TEN DOLLARS ($2,438,110.00), and ALL PERSONS INTERESTED THEREIN,

Defendants.

COOLAHAN, District Judge.

This matter came before the Court on a motion by the plaintiffs to remand to the Superior Court of Hudson County. The matter was argued and briefs were submitted.

It appears from the evidence that on July 3, 1962 the above captioned sum of money was discovered in a garage in Jersey City. Subsequent to the discovery the money was taken into custody on the premises by agents of the

Federal Bureau of Investigation and has since been turned into the Treasury of the United States. On July 5, 1962 a jeopardy assessment in excess of three million dollars was set down against Joseph V. Moriarity by the District Director of Internal Revenue Service. It is the contention of both the District Director and the County of Hudson that Moriarity is the owner of the money found in Jersey City.

On January 16, 1962 Moriarity had pleaded guilty to a violation of the gambling laws of New Jersey and was, on June 3, 1962, and is still serving a sentence therefor.

The action which is the source of this motion was filed on September 4, 1962 whereby the plaintiffs sought a determination that the aforementioned money is contraband and hence should be paid into the Treasury of the County of Hudson, pursuant to N.J.S.A. 2:152-9.[1] This ac-

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[1] Disposition, on conviction, of money seized; order of forfeiture.

If the trial or other ultimate disposition of such charge or charges, indictment or indictments result in a record of conviction being entered against the person or persons so arrested as aforesaid, in connection with which arrest the said money, currency or cash was seized or captured, as aforesaid, then the county treasurer may, after 6 months from the date of the record of the entry of such conviction, make application, without prior notice, to the county court for an order to show cause why such money, currency or cash so seized or captured, shall not be forfeited to the sole use and gain of the county; such order to show cause shall then be served upon the person from whom said money, currency or cash was so seized or captured, in accordance with the rules of practice and procedure. Upon the return of the said order, hearing shall be conducted in summary manner, and at such

(Footnote continued on following page)

tion was instituted in the Superior Court of the State of New Jersey, Hudson County, and among those served with process was Chris L. Gross, the then District Director of the Internal Revenue Service. On October 16, 1962 Gross, by petition, removed this matter to the United States District Court, Newark, New Jersey and after such removal was effected plaintiffs brought this present motion to remand.

The remand is sought on several grounds. The chief contention is that this suit is in the nature of an action in rem and does not seek in personam relief against a Federal Officer. It is further argued that this is a statutory penal action and that being so there is no jurisdiction in the Federal Courts to determine such a cause.

The District Director disputes the above contentions and argues that the suit is in reality an in personam action against a United States Officer and hence removable under 28 U.S.C. §1442a(1). The Director also raised the point at oral argument that a decision in this case involved a determination of a Federal lien and hence should be removable under 28 U.S.C.A. §1444.

(Footnote continued from preceding page)

hearing proof of the conviction shall be prima facie evidence that the money, currency or cash so seized or captured was used in connection with the unlawful playing of any game wherein money or other thing of value is wagered or gambled; provided, however, that proof, to the satisfaction of the court, shall first be established that no action or proceeding, then pending and undetermined, has been filed in any court of competent jurisdiction against said county treasurer seeking a recovery or return of the money, currency or cash so held in custody.

Appendix C

This case presents a novel and distinct factual situation, entirely different from the cases which have preceded it under the aforementioned New Jersey Statute. A thorough and exhaustive search of the law has disclosed no controlling case law on the specific legal questions involved. Analysis of the legal principles involved evidence several subsidiary problems which have been decided by substantial authorities. It is the sum total of these fundamental legal concepts which will furnish, the Court believes, the correct solution to the question at Bar.

The plaintiffs' basic contention is that this is purely an in rem action and not a suit against a Federal officer. If this be true then removal could not be had since the res which forms the subject matter of the action would be in control of the State forum. An in rem action by its nature contemplates control of the res which forms the subject matter of the controversy at the outset of the suit. Such control was present in prior cases arising under the New Jersey Statute in question. See *State* v. *Link*, 14 N. J. 446 (1954) and *Spagnuolo* v. *Bonnet*, 16 N. J. 546 (1954). In the case at Bar the money which allegedly is the res of the purported in rem action was taken into custody by agents of the F.B.I. There has been no basis shown for the theory that this money was seized by New Jersey officials, thus allowing the jurisdiction of the New Jersey Court to attach.

The plaintiffs contend that the Statute provides for an in rem action and hence this characterization must apply. *Beck* v. *Otero Irr. Dist.*, 50 F. 2d 951 (D. Colorado 1931) held that the mere statutory designation that a suit is in rem will not be binding as such unless the facts involved support this conclusion. The case further states

that in rem usually means custody of the property by the Court whose jurisdiction is being invoked.

The money forming the res in this case has admittedly been covered into the Treasury of the United States. Manifestly the New Jersey Superior Court has no control over such money at this time. The facts, as elicited, indicate there was never any control of this money by New Jersey authorities. It should be noted that the empowering New Jersey Statute itself is expressed in terms of "money siezed." See also *Spagnuolo* v. *Bonnet, supra.* Therefore there appears to be no jurisdiction over the subject matter so as to support an in rem action in the New Jersey Superior Court.

This Circuit has allowed the dismissal of cases removed to the Federal Court where there was a lack of jurisdiction over the subject matter in the State action. In *Pennsylvania Turnpike Commission* v. *McGinnes,* 179 F. Supp. 578 (E. D. Pa., 1959) a suit against a District Director was removed under 1442a(1) and dismissed as against the Director for lack of subject matter jurisdiction. This case was affirmed on appeal in 278 F. 2d 330 (3rd Cir.) (Case II). In *Stack* v. *Strange,* 94 F. Supp. 54 (S. D. N. Y. 1950) a suit against a Secret Service Agent was demoved and dismissed as being in reality a suit against the Sovereign.

The District Director has cited the above cases in his brief to support his contentions. However, this Court is not convinced that this suit is merely an in rem action erroneously commenced. To the contrary, there is strong reason to believe that this suit is purely an in personam matter seeking to determine the rightful owner of money found in the Jersey City garage.

Appendix C

United States v. *Klein,* 303 U. S. 276 (1937) holds that a State has a right to adjudicate the title to a fund in possession of the United States Treasury on an in personam basis. Such an adjudication could only designate the rightful claimants to the fund, but could not control its distribution.

The plaintiffs in this matter have set up a claim to the money under N.J.S.A. 2A:152-9. The District Director has claimed said money by virtue of a jeopardy assessment filed against Joseph V. Moriarity. In addition there are other parties claiming title to the fund. These include the State of New Jersey and the actual finders of the money. The finders have commenced an action in the Federal Court to establish their right to the money while the State of New Jersey's case has been removed to this forum by the District Director. See *Saracena, et al* v. *Gross,* (Action filed Oct. 1, 1962) Civil Number 793-62 and *State of New Jersey* v. *Gross,* (Petition filed Sept. 20, 1962) Civil Number 757-62. In addition other individuals have been noticed of the plaintiffs' proceedings and the Court has heretofore dealt with other claimants to the money in this Court. See *Brenner, et al* v. *Bachman, et al* Civil Number 662-62. The Court is further apprised of the fact that additional claims are to be filed.

In light of the above it would seem that any adjudication in reference to the money seized must be on an in personam level. Neither the New Jersey State Court nor the United States District Court has an effective control over the res. However both Courts would appear competent to adjudicate the rights to the fund on an in personam level. There is a basic rule of necessity which states that where one Sovereign has assumed jurisdiction

over property it should exercise that jurisdiction to the exclusion of the other. Such a holding can be found in *Penn Co.* v. *Pennsylvania,* 294 U. S. 189 (1935) and *Harkins* v. *Brundage,* 276 U. S. 36 (1928). These decisions recognize that where a Court has properly taken property into its possession, jurisdiction is thereby withdrawn from all other fora. However, such cases do not prevent in personam actions directed to such property. *Lyon Bonding Co.* v. *Karatz,* 262 U. S. 77 (1923); *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922) and *1A Moore's Federal Practice,* 0.222, P. 2607 (1961 Edition).

Since, therefore there can be no basis for the exercise of an in rem jurisdiction by any New Jersey Court this case appears to be an in personam action directed at establishing the plaintiffs' right to the money seized. Therefore, removal of this case to the Federal Court will not interfere with any Sovereign exercise of power by the New Jersey Court. See *United States* v. *Certain Parcels of Land, etc.,* 72 F. Supp. 1017 (S. D. Calif. 1945) and *Ferguson* v. *Tabah,* 288 F. 2d 665 (2nd Cir. 1962).

It is further contended by the plaintiffs that this suit seeks no relief against a United States officer and is therefore not removable. The District Director, however, was served with the order to show cause and complaint whereby the plaintiffs sought title to the money. *United States* v. *Klein, supra,* allows a State Court to make such a determination. Therefore, if the District Director had failed to appear in the State proceedings (however invalid he may have believed it to be) he would be faced with the situation which occurred in *United States* v. *Bleasby,* 257 F. 2d 278 (3rd Cir. 1958). In that action the Third Circuit properly held that a prior deci-

sion of the New Jersey State Court vesting title to the money in the County could not be collaterally attacked by the District Director who ignored the complaint served upon him pursuant to the New Jersey Statute previously mentioned. Therefore, the District Director properly became a party to this action commenced by the plaintiffs and while the New Jersey Court could adjudicate this matter without the presence of the District Director, as was done previously, the District Director was a proper party defendant in the matter.

If it is the United States which is an indispensable party to these proceedings then this suit must be dismissed absent consent of the Sovereign. *Stanley* v. *Schwalby,* 162 U. S. 255, (1896) and *1 Moore's Federal Practice,* 251. However, where the party is a United States officer and not the Sovereign, then an in personam action may be maintained. This was also stated in *Bleasby, supra,* at page 282. It must also be pointed out that in *Bleasby, supra,* the fund was seized by the State before the United States had even asserted any lien and the fund was later submitted by its State custodian to a Court of competent jurisdiction for the adjudication of rights therein.

Coming to the conclusion that the United States officer was a proper party to the in personam action instituted in the Superior Court of New Jersey, we must next decide whether removal of that action was allowable.

The plaintiffs have challenged the removal on the grounds that this was a penal Statute. However, 28 U. S.C.A. §1442a(1) provides for the removal of both civil and criminal actions where an officer of the United States

is involved as a defendant. The fact that the New Jersey Statute is penal in a sense that it works a forfeiture will not prevent its application in the Federal forum, nor is this a proper case for the doctrine of abstention to be applied. The New Jersey Statute in question has been determined both in *Spagnuolo, supra* and *Link, supra* and therefore the Federal Court is aware of the New Jersey interpretation of this Act. There is no direct attack upon the constitutionality of this Statute and the only question here is its later application to the facts of the case as will be elicited at the trial.

The District Director raised the contention that this case was removable as an incident of the question of Federal Lien Law. A similar situation, helpful by analogy, was presented in the case of *City of New York* v. *Evigo Corp.*, 121 F. Supp. 748 (S. D. N. Y. 1954). In that case the District Director voluntarily entered into the case as a defendant and removed the action to the Federal Court successfully. The allowance of removal was predicated upon 28 U.S.C.A. §1444. In accord with this principle of removal is *Coson* v. *United States,* 169 F. Supp. 671 (S. D. Cal. 1958) and *Emporium Trust Co.* v. *Dolaway,* 205 F. Supp. 280 (M. D. Pa. 1961).

Plaintiffs have stressed the underlying theme that the motion to remand must be granted since no subject matter jurisdiction exists in the Federal Court by virtue of the fact that this suit is not instituted against Federal Officers. However, Gross is now a party to the action in the real sense since his Department had asserted a lien against the money and therefore had a valid claim thereto prior to the New Jersey suit. This must be contrasted with the situation that existed in the *Bleasby* case.

Appendix C

Other cases in which Federal Courts have been found to have jurisdiction over suits against the District Director are *Szerlip* v. *Marcelle,* 136 F. Supp. 862 (1955, E. D. N. Y.) and *Gerth* v. *United States,* 132 F. Supp. 894 (S. D. Cal. 1955) where general equitable jurisdiction was found to be present as ancillary jurisdiction in order that all claims might be determined. On the problem of removal generally, see *7 Moore's Federal Practice,* 81.08, P. 4452-4454. (See footnote 2, page 4453) (1961 Edition); *1 Moore's Federal Practice,* 0.6 (5) P. 240-51 as reflecting upon removal as an incident to proper State-Federal relations, and *Tennessee* v. *Davis,* 100 U. S. 257 (1879).

Several Circuits throughout the United States have allowed removal in suits where an interest of the United States is concerned on the theory that "The cardinal concern of the United States is that all cases in which the interests of the Government are involved may be tried in Federal fora . . . The judicial powers of the Federal Courts extends to any controversy to which the United States is a party." *Hood* v. *United States,* 256 F. 2d 522 (9th Cir. 1958). In accord are *Johnson* v. *Earle,* 162 F. Supp. 149 (D. Oregon, 1958) and *Ove Gustafson Contracting Co.* v. *Floete,* 176 F. Supp. 841 (E. D. N. Y. 1959).

In addition to the above authorities there are practical considerations involved in the decision on this motion to remand. As above mentioned, there are certain other cases involving a claim to this money pending in the Federal Court. This would be the convenient forum in which to consolidate all matters and determine all issues at one trial, for where there is a possibility that Courts might render inconsistent judgments dealing with rights in the same property it is desirable that one Court ad-

judicate all claims, thereby avoiding collision between State and Federal authority. *Fischer* v. *American United Insurance Co.*, 314 U. S. 549 (1942).

It also should be pointed out that the New Jersey Statute itself recognizes the possibility of a suit in another Court and so states that no proceeding shall be commenced under its auspices where another Court of competent jurisdiction has a pending and undetermined matter.

Fear has been exhibited by the plaintiffs that in the event this matter is allowed to remain here for trial and the plaintiffs' claim is eventually vindicated the District Director will then argue on appeal that this Court lacked jurisdiction over the subject matter of the controversy. While it is a fundamental principle that jurisdiction over the subject matter is not waivable by the parties, attention is directed to *DiFrischia* v. *New York Central Railroad Company*, 279 F. 2d 141 (3rd Cir. 1960) where, at page 144, it was stated "A defendant may not play fast and loose with the judicial machinery and deceive the Courts." In that case the subject matter jurisdiction litigated and stressed by the defendant below was erroneously determined but the aforestated principle precluded a reversal of the action.

For the foregoing reasons the plaintiffs' motion to remand this case to the Superior Court of New Jersey is denied.

Let an appropriate order be submitted.

APPENDIX D

Opinion of New Jersey Supreme Court in the Related Case of *Farley* v. *$168,400.97*, reported at 55 N. J. 31 (1969)

(Filed—November 17, 1969.)

SUPREME COURT OF NEW JERSEY

A-3 SEPTEMBER TERM 1969

FRANK J. FARLEY, Treasurer of the County of Hudson, and COUNTY OF HUDSON,

Petitioners-Respondents,

v.

$168,400.97,

and

FRANK S. TURBETT, JR., District Director of Internal Revenue, and UNITED STATES OF AMERICA,

Claimants-Appellants.

Argued September 8 and 9, 1969—Decided November 17, 1969

On appeal from Superior Court of New Jersey, Appellate Division.

Appendix D

The opinion of the Court was delivered by

WEINTRAUB, C. J.

This action involves competing claims of the County of Hudson and of the United States to the sum of $168,400.97. The County contends the moneys were forfeited to it by their use in the gambling activities of Joseph V. Moriarity. The United States claims it holds a lien upon the moneys for taxes assessed against Moriarity.

The County brought this proceeding to establish its title to the fund. The United States removed the matter to the United States District Court which, however, remanded it to the State court. *State* v. *Moriarity,* 268 F. Supp. 546 (N. J. D. C. 1967). The cause was then tried, resulting in a judgment for the County. 97 N. J. Super. 458 (Law Div. 1967). The Appellate Division affirmed, 102 N. J. Super. 579 (App. Div. 1968), and we granted the petition of the United States for certification, 53 N. J. 273 (1969).

For many years Moriarity was a notorious "kingpin" in the "numbers racket" in and around Jersey City. His criminal record in that field dates from the 1930s. On March 2, 1962 he was sentenced to State Prison on a guilty plea to possession of lottery slips, and he remained in the State's custody until March 12, 1964, when he was delivered to federal authorities who held him until January 6, 1965.

While Moriarity was thus in custody, a chance event occurred which ultimately led to this litigation. On July 3, 1962 some workmen, renovating private garages at

127-131 Oxford Avenue, Jersey City, discovered $2,438,-110 in currency and sundry papers in an old automobile. Those papers revealed Moriarity's operation of a gambling enterprise over an extended period.[1]

This discovery precipitated activity at federal and local levels. On July 5 the District Director of Internal Revenue made a jeopardy assessment against Moriarity for income taxes and interest in the sum of $3,422,792.66. It is agreed that the federal lien became effective on that date. On the following day the local police discovered and seized the moneys involved in the action before us, under the following circumstances.

Since the papers found on July 3 related to a period which had ended sometime before the date of Moriarity's imprisonment, the police began a search for records of Moriarty's intervening operations and related cash. Moriarty having selected a private garage for the cache discovered on July 3, the police thought it likely that he used still another garage to house the records and the product of that further gambling activity. This assumption proved correct, for, peering into a private garage at 56 Oxford Avenue, stipulated by the parties to be "in close proximity to the garage in which the $2,438,110 had been found on July 3, 1962," the officers saw the familiar paraphernalia of a lottery operation. Later on the same day, armed with a search warrant obtained upon that showing, they entered the garage and seized the moneys here involved, together with sundry papers revealing gambling operations from December 14, 1961 to Febru-

[1] The moneys thus found are involved in other proceedings in the United States District Court.

ary 19, 1962, the day before Moriarty was taken into custody. This discovery led to a further indictment of Moriarty, and later he pled guilty to possession of lottery slips for the period of December 14, 1961 to July 6, 1962, the date when the police seized the moneys here involved.

There is no dispute that the moneys were used in the gambling operation and were contraband on that account. Rather, the question is whether the tax lien attached to the moneys before title passed to the County. The United States contends the forfeiture could have occurred only when the moneys were seized by the police on July 6, which was one day after the date of the tax lien, while the County contends the forfeiture occurred at the moment the moneys were used for gambling, so that on the day of the tax assessment Moriarty had no property interest in the moneys to which the tax lien could attach. Upon this appeal the United States also urges, we think for the first time, that the Fourth Amendment bars the County's claim because the moneys were obtained by an unlawful search and seizure. We will treat the two issues in that order.

I.

The federal statute provides for "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging" to the delinquent taxpayer, 26 U.S.C.A. § 6321. Whether the taxpayer has "property" or "rights to property" to which the tax lien may attach is controlled by State law. *Aquilino* v. *United States*, 363 U. S. 509, 512, 4 L. ed. 2d 1365, 1368 (1960). The pivotal question, then, is whether, under our State law, the moneys were the property of Moriarty on the effective date of the tax lien or had already been for-

feited to the County upon their use in his gambling operation.

There were two types of forfeiture under the English practice at the time of the American Revolution. They are described by Mr. Justice Story in *The Palmyra,* 12 Wheat. 1, 14, 6 L. ed. 531, 535 (1827), in these words:

> "• • • It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment or conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum prohibitum, or malum in se. The same principle applies to proceedings in rem, on seizures in the admiralty."

In *Palmyra,* the question was whether the statutory forfeiture of the offending article depended upon a con-

viction of the offending person. The Court held that it did not. The Court had no occasion to say when the forfeiture did occur, but other authorities laid down some precise rules.

With respect to the so-called "common law" forfeiture *i.e.*, the forfeiture which depended upon the owner's conviction of treason or felony, the common law held that "The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of the conviction shall be forfeited." IV *Blackstone, Commentaries,* *388. This view of the common law forfeiture was accepted in *United States* v. *Stowell,* 133 U. S. 1, ——, 33 L. ed. 555, 560 (1890). The doctrine of forfeiture upon conviction of treason or felony of course never obtained in our State, N.J.S.A. 2A: 152-2, or elsewhere in this country, 36 *Am. Jur.* 2d, *Forfeiture and Penalties* § 15, p. 622. We nonetheless refer to it because, although the forfeiture resulted from the commission of an offense rather than the misuse of the property forfeited, still the common law found that title to real property was forfeited as of the time of the criminal act rather than as of the date of conviction. The rule was otherwise as to personal property because of the practical considerations stated by Blackstone, at the reference just given:

> "Therefore a traitor or felon may *bona fide* sell any of his chattels real or personal, for the sustenance of himself and family between the fact and conviction; for personal property is of so fluctuating a nature, that it passes through many hands

> in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors have committed a treason or felony."

But as to the so-called "statutory" forfeiture, *i.e.*, the forfeiture of the very property used in violation of the law, the rule has been constant, whether the offending property be real or personal, that title may be forfeited as of the moment of the offending use. Unlike the "common law" forfeiture which embraced all of the individual's property and resulted from the individual's personal offense, the "statutory" forfeiture is limited to the offending property itself, "which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." *Various Items of Personal Property, etc.* v. *United States,* 282 U. S. 577, 581, 75 L. ed. 558, 561 (1931).[2]

Thus in *United States* v. *1960 Bags of Coffee,* 8 *Cranch* 398, 3 L. ed. 602 (1814), which involved a statute forbidding the importation of certain articles, it was held that the statutory forfeiture occurred at once and therefore the title of the government was not cut off by a sale of the commodity to an innocent buyer. So in *United States* v. *One Hundred Barrels Distilled Spirits,* 81 U. S. 44, 20

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[2] In rejecting the contention that substantive due process prevented the forfeiture of innocent interests in property used illegally, the Supreme Court found some analogy to the ancient doctrine of *deodand* by which a personal chattel which was the immediate cause of the death of a human was forfeited. *J. W. Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U. S. 505, 511, 65 L. ed. 376, 379 (1921).

L. ed. 815 (1872), in which the forfeiture ensued because liquor was moved with intent to defraud the United States of taxes, it was held that title vested immediately in the United States when the liquor was so moved and that the subsequent payment of the tax did not vacate the forfeiture, even though the property had been sold to an innocent buyer. The Court stated the rule in these words (81 U. S. at 56-57, 20 L. ed. at 816-817):

> "Where the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree. * * * Many such adjudged cases are to be found in the reported decisions of this court, and it must be admitted that they establish the rule beyond all doubt, *that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent;* and that in all such cases it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property, even to a bona fide purchaser for value, without notice of the wrongful acts done and committed by the former owner." (Emphasis added.)

The authorities just cited speak in terms of the relation-back of the judgment to the time of the forfeiting

act. This does not mean that the State's title is merely "inchoate" up to the time of a judicial judgment within the meaning of decisions which found that certain liens authorized by State law depended for their substance upon later events and therefore were inferior to an intervening federal tax lien even though under State law the liens were fully effective as of their original filing dates. See *United States* v. *Security Trust & Savings Bank of San Diego*, 340 U. S. 47, 95 L. ed. 53 (1950); *United States* v. *Acri*, 348 U. S. 211, 99 L. ed. 264 (1955); *United States* v. *Pioneer American Ins. Co.*, 374 U. S. 84, 10 L. ed. 2d 770 (1963); *United States* v. *Equitable Life Assurance Society*, 384 U. S. 323, 16 L. ed. 2d 593 (1966). On the contrary, the proposition in the excerpt quoted above from *One Hundred Barrels Distilled Spirits* is unequivocal that "the forfeiture becomes absolute at the commission of the prohibited acts and that the title from that moment vests in the United States * * *." The earlier statement in the same excerpt that "the decree of condemnation when entered relates back to the time of the commission of the wrongful acts and not from the date of the sentence or decree," means only that the decree adjudges and confirms that title passed when the wrongful act was done.

This thesis clearly appears in the opinion of Chief Justice Marshall in *United States* v. *Grundy*, 3 *Cranch* 337, 351, 2 L. ed. 459 (1806). After stating that (3 *Cranch* at 350-351, 2 L. ed. at 463:

> "Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute."

the Chief Justice said (3 *Cranch* at 352-353, 2 L. ed. at 464):

> "If the property in the vessel was actually vested in the United States by the commission of the offense, then the judgment of a court, condemning the vessel, or declaring it to belong to the government, would, in fact, do nothing more than ascertain that the offense had been committed; it would not vest the thing more completely in the government, in point of right, than it was vested by the commission of the offenses."

That title may pass at once upon the commission of the offending act was reiterated in *United States* v. *Stowell, supra,* 133 U. S. 1, 33 L. ed. 555, and *Texas* v. *Donoghue,* 302 U. S. 284, 82 L. ed. 264 (1937).

In short, then, when a statute provides for a forfeiture, the forfeiture takes place upon the occurrence of the forbidden act or omission unless the statute provides otherwise, and the sovereign's title is in no sense inchoate because procedural due process requires an opportunity to dispute the claim of forfeiture in a judicial proceeding. The judgment in such a proceeding simply resolves a title contest, as it does in other settings, as when the situs of ownership depends upon the construction of a will or a deed, or upon a relationship to a deceased, or upon adverse possession. The judgment which settles the dispute does not initiate the title; it serves only to confirm the title by dissipating claims against it.

As we understand the argument before us, the United States agrees that property may be forfeited immediately upon its offensive use and thereupon nothing remains to

which the federal tax lien may attach even though the tax is assessed prior to a judgment verifying the fact of forfeiture. Rather, the United States says our Legislature intended the forfeiture should not occur until the property is actually seized. Upon this premise the United States contends that, prior to seizure the State's right (*i.e.*, to seize the property and thereby accomplish the forfeiture) was merely "inchoate" within the concept underlying the competing lien claim cases cited above. The United States urges that if *Spagnuolo* v. *Bonnet*, 16 N. J. 546 (1954), is read to hold that title vests at the time of the gambling use, it should be rejected. We read *Spagnuolo* so to hold and find upon a review of the subject that *Spagnuolo* correctly took that view.

The forfeiture of things used in gambling derives from L. 1878, c. 78, p. 137, which provided that:

> "Whenever any furniture or implements made or used for the playing of the game of faro, roulette, rouge et noir, or any unlawful game, shall be seized or captured by the police, constabulary or other officers in this state, it shall be the duty of the prosecutor of the pleas in the county where such seizure is made, to have the same destroyed or rendered useless for the uses and purposes aforesaid, and it shall be unlawful to return the same to the person or persons owning the same, or to any person whatsoever."

That statute is now N.J.S.A. 2A:152-6.[3] It did not ex-

[3] Additional provisions added by amendment in 1951 do not aid the present inquiry and therefore need not be mentioned.

pressly say the offending article was forfeited but the fact of forfeiture was of course implicit in its terms.

In *Kenny* v. *Wachenfeld,* 14 N. J. Misc. 322, 184 A. 737 (Sup. Ct. 1936), the plaintiff sought to replevin cash bet with him as a bookmaker. In denying recovery, the former Supreme Court said (p. 323):

> "It seems clear that since the money was earmarked and segregated, as part of a gambling operation, it could be as well seized as a gambling device. Because of the use, the money became contraband and the appellant [plaintiff] may not receive possession thereof."

Although the 1878 statute we have just quoted was not mentioned, it is plain that the court had its provisions in mind.

By L. 1941, c. 70, p. 156, the Legislature added provisions which now appear as N.J.S.A. 2A:152-7 through 11. The 1941 statute did not supersede the 1878 act. Rather, accepting and confirming the view that the 1878 statute forfeited moneys used in gambling, the Legislature by the 1941 act resolved the question whether the forfeited moneys belonged to the State or the county,[4]

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[4] The title of the statute states expressly that it is a supplement. The statement of purpose annexed to the 1941 bill reads:

> "Funds seized by law enforcement officials in gambling and gaming raids and arrests are customarily surrendered to the county treasurer. This act would provide a method to justly and lawfully dispose of such funds after the termination of the cases in which the seizure of said funds were involved, thus eliminating the present doubts, now existing, respecting the right to apply such funds to the use of the county, or to return such funds to the rightful owner, as the case may be."

and decided the contraband should be the county's, no doubt because the county bears the dollar brunt of criminal prosecutions, see *State* v. *Rush*, 46 N. J. 399 (1966). The 1941 statute also provided a simplified procedure for the determination of claims to the moneys. Nothing in that measure suggests the further purpose of delaying the forfeiture until the moneys are actually seized.

The first section of the 1941 statute, N.J.S.A. 2A:152-7, reads:

> "Whenever any money, currency or cash shall be siezed or captured by the police, constabulary or other officer *in connection with any arrest* for violation of or conspiracy to violate any gambling law of this state, the said money, currency or cash *shall be deemed prima facie to be contraband of law,* as a gambling device, or as part of a gambling operation, and it shall be unlawful to return the said money, currency or cash to the person or persons claiming to own the same, or to any other person, except in the circumstances and manner hereinafter provided." (Emphasis added.)

It will be noted that the section speaks of moneys seized or captured "in connection with any arrest" for a gambling violation. In *State* v. *Link,* 14 N. J. 446 (1954), the gambling moneys were taken from a wall safe in Link's home pursuant to a search warrant. Link had been arrested on an earlier date. It was urged that the moneys were not the property of the county because they were not seized "in connection with any arrest." The Court rejected that position. It found that the phrase "in connection with any arrest" did not require the seizure to coincide with the arrest and hence the prior arrest of Link satisfied that statu-

tory language. The underlying thesis was that the 1941 statute did not create the forfeiture, but rather fashioned a procedure for litigating claims over the fund. The opinion closed with the observation that "if the money was contraband when it was seized, it still remained contraband despite the failure to arrest at the precise time the currency was impounded. Its legal status was not changed by such an omission." (14 N. J. at 454.)

Thus the 1941 statute formulated a procedure for resolving the claims to moneys and endeavored by its first section, quoted above, to establish an incidental rule of evidence that whatever moneys are seized "in connection with an arrest * * * shall be deemed *prima facie* to be contraband of law as a gambling device." But in providing for a procedure and the incidental rule of evidence, the Legislature did not intend thereby to limit the substantive reach of the 1878 statute to situations in which the gambling moneys are seized at the time of arrest or in connection with the arrest. Indeed, the 1941 statute was not intended to prescribe an exclusive procedure even with respect to articles seized at the time of arrest, and hence it was held in *Farley* v. *Manning*, 4 N. J. 571 (1950) that the title dispute could be resolved in an interpleader action.[5]

This brings us to *Spagnuolo* v. *Bonnet, supra*, 16 N. J. 546, which the United States seeks to distinguish. There the gambling moneys were in fact seized prior to the jeopardy tax assessment by the federal government and hence

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[5] We note that a forfeiture statute need not provide for procedural due process. In this State, the judiciary itself has the constitutional power to provide for the demands of procedural due process, whatever they may be. *State* v. *American-Hawaiian Steamship Co.*, 29 N. J. Super. 116, 128-129 (Ch. Div. 1953).

the case did not turn upon whether the forfeiture occurred before or at the time of seizure. Rather the United States contended "that the County of Essex had nothing more than an inchoate lien or potential contingent property right in the money until the order of forfeiture * * *; that at most any right of the county to the money was purely contingent at least until * * * the date of Spagnuolo's conviction." (16 N. J. at 556.) The Court rejected both propositions and held for the County.

The seizure having antedated the federal tax assessment, the County apparently referred to the date of seizure in the course of its argument that the forfeiture did not depend upon the judgment. The opinion refers several times to the seizure, doubtless because of the manner of argument. But the ultimate thesis was that the moneys were forfeited at the time of their use in gambling. After noting that the forfeiture was directed by the 1878 act (p. 556), and that the 1941 statute was simply a supplement which did not restrict the reach of that measure (pp. 557-559), *Spagnuolo* said (pp. 559-560:)

> "The trial court, on the proofs offered, declared the money to be contraband and entered the confirming judgment of forfeiture under the statute. He had no other alternative. Where a forfeiture is absolute under the statute, as it is here, the judgment of condemnation or forfeiture when entered relates back to the commission of the wrongful act and takes date from the wrongful acts, not from the the date of sentence or decree. *United States* v. *1960 Bags of Coffee,* 8 Cranch 398, 3 L. ed. 602 (1814); *In re Henderson's Distilled Spirits,* 14 Wall. 44, 81 U. S. 44, 20 L. ed. 815 (1872); *United*

States v. *Pacific Finance Corp.*, 110 F. 2d 732 (2d Cir. 1940), and the cases cited therein. *Cf. Motlow* v. *State of Missouri*, 295 U. S. 97, 55 S. Ct. 661, 79 L. ed. 1327 (1935); 51 *Harv. L. Rev.* 1112.

The established rule is that the forfeiture becomes absolute at the commission of the prohibited acts and the title from that moment vests in the state or government in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of the law, without giving any alternative remedy or providing any substitutes for forfeiture or allowing any exceptions to its enforcement, and that in all such cases it is not in the power of the offender or the former owner to defeat the forfeiture by any subsequent transfer of the property, even as to a *bona fide* purchaser for value, without notice of the wrongful acts done or committed by the former owner. The forfeiture is considered as directed against the thing itself, not merely the possessor's interest in it. *In re Henderson's Distilled Spirits, supra.*"

Thus *Spagnuolo* concluded that the forfeiture occurred at the time the moneys were wrongfully used, and this because the Legislature did not express a purpose to delay it. We add that the reference in the excerpt from *Spagnuolo* to the concept of relation-back of the judgment meant only, as we have already said, that the judgment, in the words of the same excerpt, is the "confirming" judgment of forfeiture.

Thus the rationale of *Spagnuolo* repels the proposition urged upon us here, that the Legislature intended the forfeiture to occur only upon seizure. Nor did *Spagnuolo*

err in that regard. That the 1878 statute referred to a seizure does not suggest the forfeiture was to await that event. The statute was couched as a mandate upon the prosecutor with respect to the disposition of property seized and hence understandably referred to the seizure as the event which triggered the prosecutor's duty. The forfeiture itself was implicit in the statute, as we have already said.

We see no reason why the Legislature would want to delay the forfeiture until seizure or to make the forfeiture depend upon it. That construction was rejected in similar cases. So *United States* v. *Stowell, supra,* 133 U. S. at ——, 33 L. ed. at 560, held the statute's use with reference to offending articles of the phrases "wherever found" and "found in the distillery," did not express an intent to delay the forfeiture to the time when the articles were found. Again, *United States* v. *Pacific Finance Corp.,* 110 F. 2d 732 (2 Cir. 1940), held a statutory mandate that vehicles used for smuggling "shall be seized and forfeited" did not negate an intent to forfeit the vessel at the time of its illegal use. To the same effect is *United States* v. *One 6.5 MM. Mannlicher-Carcano Military Rifle, etc.,* 250 F. Supp. 410 (N. D. Tex. 1966). But see *Stout* v. *Green,* 131 F. 2d 995 (9 Cir. 1942).

It is true, of course, that forfeited property, if not seized, may never reach the hands of the condemning sovereign. That is equally true of the federal tax lien which may touch things of which the United States may never learn. But that is no reason to assume that either legislature intended the sovereign's interest to arise only when the property is actually in its grasp.

Appendix D

II.

The second point the United States advances is that the moneys were obtained by an illegal search and seizure and for that reason the Fourth Amendment bars their retention by the County.

The issue is not before us. It was not raised in the trial court or on appeal to the Appellate Division, or for that matter in the brief filed with us. The legality of the seizure was questioned only in connection with the unsound claim that the word "seized" in the State forfeiture statute (N.J.S.A. 2A:152-6) means "lawfully" seized and hence the statute does not forfeit contraband if its seizure is illegal.

It would be unfair to the County to accept the Fourth Amendment issue at this stage. There was in fact a search warrant and the supporting affidavit revealed an adequate basis for it. The United States refers to some testimony later given by the officer as to how he peered into the garage, and it argues that an illegal "entry" into the garage thereby occurred. But the total facts were not developed, and understandably so since the sole point being pressed, *i.e.*, that our Legislature conditioned the forfeiture upon the legality of the seizure of the property, was untenable as a matter of law. We will not at this late hour permit an attack which was not in view when the record was made.

We add nonetheless that if the challenge were accepted it would fail even if we assumed the search and seizure somehow invaded Moriarty's Fourth Amendment right and assumed also, for the moment, that the federal doctrine barring the use as evidence of things illegally seized would also bar the sovereign's title to contraband so seized.

Appendix D

The cases presently hold that evidence illegally seized will be suppressed only upon the complaint of one whose rights were violated by the search. See *Alderman* v. *United States,* 394 U. S. 165, —— 22 L. ed. 2d 176, 185-187 (1969); *United States* v. *One 1963 Cadillac Coupe de Ville Two-Door,* 250 F. Supp. 183 (W. D. Mo. 1966); *United States* v. *One 1953 Model Mercury Sedan Auto,* 149 F. Supp. 657 (S. D. Ala. 1957); *United States* v. *One 1952 Ford Victoria,* 114 F. Supp. 458 (N. D. Cal. 1953); *State* v. *One 1960 Mercury Station Wagon,* 5 Conn. Cir. 1, 240 A. 2d 99 (Cir. Ct. App. Div. 1968).

The United States does not have the required standing. The Fourth Amendment protects the privacy of people from intrusion by the federal government. It would be hard to find that the United States is itself the intended beneficiary of a constitutional provision intended to restrain it, or that the United States is a person within the meaning of a provision designed to establish a right of privacy. And if the United States could claim the cover of the Fourth Amendment, still it had no right of privacy in Moriarty's garage. Nor, if we are correct in our conclusion under Point I, did the United States have any interest in the moneys themselves since they were the County's when the federal tax lien was sought to be levied. Nor could it be said that Moriarty held the moneys consensually for the United States. He was an antagonist of both the United States and the State of New Jersey. Both pursued him, and the Fourth Amendment stood between them and him. For all of those reasons the United States could hardly maintain its constitutional rights were insulted when the police officer looked into Moriarty's garage or entered it under the search warrant.

Still further, if somehow it had standing to question the seizure of the moneys and if the seizure were illegal, the United States could not prevail on its ultimate claim that a violation of the Fourth Amendment will deprive the County of its title to the moneys. At the oral argument before us the United States for the first time urged that *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 14 L. ed. 2d 170 (1965), held that contraband may not be retained if the sovereign obtained possession by a seizure violating the Fourth Amendment. That was not the law before *One 1958 Plymouth Sedan.* See *United States* v. *Jeffers,* 342 U. S. 48, 96 L. ed. 59, 65 (1951); *Trupiano* v. *United States,* 334 U. S. 699, 92 L. ed. 1663, 1672 (1947); *United States* v. *Eight Boxes, etc.,* 105 F. 2d 896 (2 Cir. 1939); *United States* v. *$1,058 in United States Currency,* 323 F. 2d 211 (3 Cir. 1963); *United States* v. *One 1956 Ford Tudor Sedan,* 253 F. 2d 725 (4 Cir. 1958); *Sanders* v. *United States,* 201 F. 2d 158 (5 Cir. 1953); *Grogan* v. *United States,* 261 F. 2d 86 (5 Cir. 1963); *United States* v. *One Bally "Barrel-O-Fun" Coin-operated Gaming Device,* 224 F. Supp. 794 (M. D. Pa. 1963); *United States* v. *Pauper Finance Corp.,* 110 F. 2d 732, 733 (2 Cir. 1940). But *cf., Berkowitz* v. *United States,* 340 F. 2d 168 (1 Cir. 1965). See Annotation, 8 A. L. R. 3d 473, 475 (1966). And we do not believe that *One 1958 Plymouth Sedan* holds the other way.

We heretofore read *One 1958 Plymouth Sedan* to hold only that evidence illegally seized could not be used in a forfeiture proceeding against the victim of the search, rather than to say that the State must return contraband to the culprit even though the fact of contraband is shown by other admissible evidence. *State* v. *Sherry,* 46 N. J. 172, 178 (1965). Doubt having since been expressed

as to whether *One 1958 Plymouth Sedan* should be so read, see *John Bacall Imports, Ltd.* v. *United States,* 287 F. Supp. 916, 924 (C. D. Cal. 1968), and annotation cited above, 8 A. L. R. 3d at 474, we add a further statement in support of our interpretation of that case.

If in *One 1958 Plymouth Sedan* the Court meant that the illegal seizure of the automobile operated to prevent or undo the forfeiture, a simple statement to that effect would have disposed of the matter. Neither the issue nor the result was stated in such terms. The issue was clearly said to be whether the illegally seized contents of the vehicle could be used to prove that the vehicle had been improperly employed and hence forfeited. Thus the Court said (380 U. S. at 698, 14 L. ed. 2d at 173-174):

> "In both the *Boyd* situation and here the essential question is whether evidence—in *Boyd* the books and records, here the results of the search of the car—the obtaining of which violates the Fourth Amendment may be relied upon to sustain a forfeiture. *Boyd* holds that it may not."

The Court then discussed *United States* v. *Jeffers, supra,* 342 U. S. 48, 96 L. ed. 59, and *Trupiano* v. *United States, supra,* 334 U. S. 699, 92 L. ed. 1663. Presumably the government argued that under those cases illegally seized evidence, although not usable to obtain a conviction for crime, need not be returned to the defendant if it is contraband. The Court agreed that *Jeffers* and *Trupiano* so held, and without in anywise questioning the correctness of that holding, the Court pointed out that in those cases the articles were contraband on their face, so that the fact of contraband did not depend upon the

use of illegally seized evidence. Far from saying that a forfeited article which is not *per se* contraband must be returned because it was illegally seized even though the forfeiture can be shown by other untainted proof, the Court expressly pointed out that Pennsylvania had no other evidence to show the illegal use of the vehicle. Thus, the opinion reads (380 U. S. at 699, 14 L. ed. 2d at 174):

> "It is apparent that the nature of the property here, though termed contraband by Pennsylvania is quite different. There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particluar automobile was put that subjects Mr. McGonigle to its possible loss. And it is conceded here that the Commonwealth could not establish an illegal use without using the evidence resulting from the search which is challenged as having been in violation of the Constitution."

Hence we remain of the view that *One 1958 Plymouth Sedan* does not hold that a State or the United States is deprived of property which was forfeited to it if it acquired possession of that property by a search and seizure proscribed by the Fourth Amendment.

Nor will we on our own adopt the rule urged upon us. The Fourth Amendment does not call for the suppression or return of things obtained in violation of its terms. The exclusionary rule was judge-made, upon the belief that no other sanction could deter insolence in office. A majority of the States, including our own, were not persuaded to adopt that rule, *Eleuteri* v. *Richman*, 26 N. J. 506, 511 (1958). Doubts remain as to its wisdom. *State*

v. *Gerardo,* 53 N. J. 261 (1969). We see no reason to go beyond that rule and to forfeit what is the State's property because of the manner whereby it obtained possession.

Such a doctrine would redound equally against the United States, for if an illegal search should bar a State from asserting its title, it should as well bar the United States from asserting its tax lien whenever the subject property is revealed by an infraction of the Constitution. And with the demise of the "silver platter" doctrine, *Elkins* v. *United States,* 364 U. S. 206, 4 L. ed. 2d 1669 (1960), both sovereigns would be barred no matter whose constabulary unlawfully unearthed the fund. We can see no value in that result. The beneficiary would be the guilty, and primarily parties to organized crime, who even now are too well insulated by current constitutional concepts. And so, here, the thesis the United States presses upon us would also defeat its claim to those moneys. The winner would be Mr. Moriarty.

The judgment is affirmed.

APPENDIX E

Federal Statute

§ 7426. CIVIL ACTIONS BY PERSONS OTHER THAN TAXPAYERS

(a) Actions permitted.—

(1) *Wrongful levy.*—If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

(2) *Surplus Proceeds.*—If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) *Substituted sale proceeds.*—If property has been sold pursuant to an agreement described in section 6325(b) (3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action

against the United States in a district court of the United States.

(b) *Adjudication.*—The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) *Injunction.*—If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) *Recovery of property.*—If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the

minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) *Surplus proceeds.*—If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

(4) *Substituted sale proceeds.*—If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b) (3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) *Validity of assessment.*—For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

(d) *Limitation on rights of action.*—No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

(e) *Substitution of United States as party.*—If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former offi-

cer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States.

(f) *Provision inapplicable.*—The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) *Interest.*—Interest shall be allowed at the rate of 6 percent per annum—

(1) in the case of a judgment pursuant to subsection (b) (2) (B), from the date the Secretary or his delegate receives the money wrongfully levied upon to the date of payment of such judgment; and

(2) in the case of a judgment pursuant to subsection (b) (2) (C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment.

New Jersey Statutes

2A:152-6. Destruction of Gaming Apparatus

Whenever any furniture, implement, device or machine, made or used for the purpose of gambling or for the playing of any game wherein money or other thing of value is wagered or gambled, shall be seized or captured by the police, constabulary or other officer, the prosecutor of the county where such seizure is made shall have the same destroyed or rendered useless for the uses and pur-

poses aforesaid, and it shall be unlawful to return them to the person or persons owning the same, or to any other person; provided, it shall be lawful for the prosecutor, in his discretion and subject to rules and regulations which may be promulgated by the attorney general, to donate and deliver such of them as may be used for lawful purposes to any institution located within the county where such seizure is made and which is under the control and operation of the federal government, or to any institution, wherever located, which is under the control and operation of the state of New Jersey or any political subdivision thereof, or to any institution located within the county where such seizure is made and which is under the control and operation of any public, semipublic, or private, charitable, religious or philanthropic institution or organization.

The attorney general shall have authority to make, amend and repeal, from time to time, such rules and regulations as he may, in the public interest, deem necessary to assure an orderly procedure and reasonable uniformity in the disposition of such property in accordance with the provisions hereof, in the several counties.

HISTORICAL NOTE

Source:

R.S. 2:178-7, as am. L. 1951, c. 174.

L. 1898, c. 237, § 168, p. 923 [C.S. p. 1875, § 168].

2A:152-7. MONEY SEIZED ON ARREST FOR PLAYING UNLAWFUL GAMES; RETURN PROHIBITED; EXCEPTIONS

Whenever any money, currency or cash shall be seized or captured by the police, constabulary or other officer in connection with any arrest for violation of or conspiracy

to violate any gambling law of this state, the said money, currency or cash shall be deemed prima facie to be contraband of law as a gambling device, or as part of a gambling operation, and it shall be unlawful to return the said money, currency or cash to the person or persons claiming to own the same, or to any other person, except in the circumstances and manner hereinafter provided.

HISTORICAL NOTE

Source:

C. 2:178-7.1 (L. 1941, c. 70, p. 156, § 1).

2A:152-8. DISPOSITION PENDING TRIAL OF MONEYS SEIZED

Pending trial or ultimate disposition of the charge or charges, indictment or indictments, growing out of any arrest in connection with which any such money, currency or cash was seized or captured, the same shall be accounted for and deposited with the county treasurer of the county in which said arrest occurred, by and under the supervision of the prosecutor of the county.

HISTORICAL NOTE

Source:

C. 2:178-7.2 (L. 1941, c. 70, p. 156, § 2).

2A:152-9. DISPOSITION, ON CONVICTION, OF MONEY SEIZED; ORDER OF FORFEITURE

If the trial or other ultimate disposition of such charge or charges, indictment or indictments result in a record of conviction being entered against the person or persons

so arrested as aforesaid, in connection with which arrest the said money, currency or cash was seized or captured, as aforesaid, then the county treasurer may, after 6 months from the date of the record of the entry of such conviction, make application, without prior notice, to the county court for an order to show cause why such money, currency or cash so seized or captured, shall not be forfeited to the sole use and gain of the county; such order to show cause shall then be served upon the person from whom said money, currency or cash was so seized or captured, in accordance with the rules of practice and procedure. Upon the return of the said order, hearing shall be conducted in summary manner, and at such hearing proof of the conviction shall be prima facie evidence that the money, currency or cash so seized or captured was used in connection with the unlawful playing of any game wherein money or other thing of value is wagered or gambled; provided, however, that proof, to the satisfaction of the court, shall first be established that no action or proceeding, then pending and undetermined, has been filed in any court of competent jurisdiction against said county treasurer seeking a recovery or return of the money, currency or cash so held in custody.

HISTORICAL NOTE

Source:

C. 2:178-7.3 ((L. 1941, c. 70, p. 156, § 3).

2A:14-10 2 years and 1 year; action on penal statute

All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed:

d. Within 1 year next after the offense committed or to be committed against the statute, when the forfeiture is or shall be limited by the statute to any county * * * or to any officer of such county * * *.

APPENDIX F

Opinion of United States Court of Appeals in the Case of *Art Johnston v. Hugh Earle, et al.* Reported at 245 F. 2d 793

ART JOHNSTON,

Appellant,

v.

HUGH EARLE, Collector of Internal Revenue, Walter S. Shanks, Irwin Borthick and Irving H. Curran,

Appellees.

No. 14951.

United States Court of Appeals
Ninth Circuit.

Feb. 28, 1957.

Action against two officers of the Internal Revenue Bureau for alleged tortious seizure and conversion to their own use of a tractor belonging to plaintiff. The United States District Court for the District of Oregon, Claude McColloch, Chief Judge, entered judgment adverse to plaintiff and he appealed. The Court of Appeals, Denman, Chief Judge, held that jurisdiction of claim against defendants holding offices in Bureau of Internal Revenue, individually, based on tortious conversion of plaintiff's

property, based on Oregon law, is not conferred on federal courts under statute conferring jurisdiction on district courts over any seizure under any law of the United States, nor under statute giving District Courts original jurisdiction of a civil action arising under any internal revenue laws, nor under statute providing District Courts shall have original jurisdiction of all civil actions where amount in controversy exceeds $3,000 and arises under the Constitution or laws of the United States.

Judgment reversed with directions.

Jurisdiction of claim against defendants holding offices in Bureau of Internal Revenue, individually, based on tortious conversion of plaintiff's property, based on Oregon law, is not conferred on federal courts under statute conferring jurisdiction on District Courts over any seizure under any law of the United States, nor under statute giving District Courts original jurisdiction of a civil action arising under any internal revenue laws, nor under statute providing District Courts shall have original jurisdiction of all civil actions where amount in controversy exceeds $3,000 and arises under the Constitution or laws of the United States. 28 U.S.C.A. §§ 1331, 1340, 1356, 1442.

Before DENMAN, Chief Judge, and POPE and CHAMBERS, Circuit Judges.

DENMAN, Chief Judge.

Johnston, a citizen of the State of Oregon, appeals from a judgment in a suit against appellees, also citizens of Oregon, each holding offices in the Internal Revenue Bu-

reau. The judgment held that appellant could not recover on his complaint that defendants had tortiously seized and converted to their own use a caterpillar tractor belonging to Johnston, because the evidence failed to show they were not entitled to do so in their official capacities as federal revenue officers acting in a federal tax levy.

The controlling matter of this appeal is the question of jurisdiction. It is not a diversity case. The question is whether the acts of the appellees violated the Federal Constitution or federal law, or are they only a violation of a state law against tortious conversion. There was a pretrial at which the government's officers' contention of lack of jurisdiction was stated as follows:

> "Contentions of Defendants. 1. Neither diversity of citizenship nor a substantial federal question exists in this cause and therefore the court does not have jurisdiction of the cause. This is not a cause arising under 28 U.S.C. § 1331, 28 U.S.C. § 1340, 28 U.S.C. § 1356 or the laws or constitution of the United States [as contended by plaintiff]. The issue of jurisdiction should be segregated and determined before any of the other issues are tried."

The court held it had jurisdiction.

However, when these federal officers had secured a favorable judgment that their acts were not illegal, they abandoned their contention that the court lacked jurisdiction of the subject matter of the case and in their brief on appeal state the "sole issue"[1] *here* is whether the district

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[1] "Summary of Argument. *The sole issue herein is* whether a Collector and Deputy Collectors of Internal Revenue may be held liable for damages for the alleged unlawful conversion of certain property (a caterpillar tractor) of appellant, where the acts of the officials in levying upon the property were performed entirely within the scope of the authority vested in them by law." [Emphasis supplied.]

court properly determined the merits. Such an abandonment of the contention of lack of jurisdiction cannot create it where absent, however, pleasing to these officers it would be if we sustained their successful contentions on the merits below. We agree that the several grounds of jurisdiction claimed by Johnston are not valid.

A. *Jurisdiction of the claim based on a tortious conversion under the Oregon law is not conferred on the federal courts by 28 U.S.C. § 1356.*

This section provides:

> "§ 1356. *Seizures not within admiralty and maritime jurisdiction.* The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction."

Here the complaint alleges that the seizure was *not* under any law of the United States. The law was first stated in Section 9 of the Judiciary Act of 1789, 1 Stat. 77, as follows: "the district courts * * * shall also have exclusive original cognizance of all seizures on land * * * and of all suits for penalties and forfeitures incurred, under the laws of the United States."

That the federal courts had no jurisdiction under it for damages for conversion was early determined in the case of Slocum v. Mayberry, 1817, 2 Wheat. 1, 15 U.S. 1, 4 L. Ed. 169. There, as here, a seizure had been made of certain cargo on a vessel by the United States surveyor of customs under the direction of the director of customs. The cargo owners brought an action in replevin in the

state court of Rhode Island for the restoration of the cargo.

The Supreme Court sustained the Rhode Island court in holding that, in the absence of authority under the laws of the United States to seize the cargo, its owners could replevy it in a state tribunal. The Supreme Court continued to state what is obvious from the face of the statute:

> "If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question, whether that forfeiture has been actually incurred, belongs exclusively to the federal courts, and cannot be drawn to another *forum*; and it depends upon the final decree of such courts, whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure. And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law, or in the admiralty, for damages for the illegal act. *Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved, other than such as might be obtained in a court of admiralty, could be prosecuted only in the state court. The common-law tribunals of the United States are closed against such applications, where the party disposed to make them.*" [Emphasis supplied.] 2 Wheat. 9, 15 U.S. at 9.

Appendix F

B. *Jurisdiction for the claim of tortious conversion is not created by 28 U.S.C. § 1340.*

This statute provides:

> "§ 1340. *Internal revenue; customs duties.* The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

The complaint's claim for recovery of damages for the tortious conversion of the appellant's property by defendants is not one "arising under any Act of Congress providing for internal revenue." The basic theory of the complaint is not the return of federal taxes alleged to have been wrongfully assessed as in Roybark v. United States, 9 Cir., 1954, 218 F. 2d 164; Loetscher Co. v. Birmingham, D. C. Iowa 1950, 95 F. Supp. 892, affirmed, 8 Cir. 1951, 188 F. 2d 78, or for the return of property wrongfully seized as in Stuart v. Chinese Chamber of Commerce, 9 Cir., 1948, 168 F. 2d 709. The recovery sought is solely for a state tort by one citizen of the state against other citizens of the same state.

C. *Nor is the jurisdiction in the United States District Court created by 28 U.S.C. § 1331.*

We do not think that the district court was entitled to determine the merits of the issues of fact presented by the complaint under Title 28 U.S.C. § 1331. This section reads:

Appendix F

"§ 1331. *Federal question; amount in controversy.* The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

It is clear that the mere fact that a suit is against a federal officer does not support original jurisdiction thereof in the United States district courts on the ground that it is a case arising under the laws of the United States within the meaning of this section. This necessarily follows from Section 1442, Title 28 U.S.C., which provides for the *removal by the defendant* of such a suit from a state court to a federal district court where the act complained of is claimed to have been done under the authority of the United States. Where Congress has intended to create original federal jurisdiction over suits against certain types of federal officials, such as United States Marshals, it has expressly provided for such jurisdiction by statute. See, e.g., 28 U.S.C. § 544; Bedenbaugh v. National Surety Corporation, 5 Cir., 1955, 227 F. 2d 102. It is not contended that any such special statute is applicable here.

Nor can jurisdiction be sustained on the ground that the plaintiff's complaint alleges that defendants may plead in their answer that their acts were within the scope of their authority as federal officers. Skelly Oil Co. v. Phillips Petroleum Co., 1950, 339 U. S. 667, 672, 70 S. Ct. 876, 94 L. Ed. 1194.

Jurisdiction in the present case, therefore, can be sustained only if, by his allegation that the acts of the appellees "deprived plaintiff of the property without just

compensation and without the process of law contrary to the Constitution of the United States", appellant has asserted a federal cause of action. Of course, courts have jurisdiction to determine whether or not the subject matter of the complaint presents a cause which they can entertain. The Fair v. Kohler Die & Specialty Co., 1913, 228 U. S. 22, 25, 33 S. Ct. 410, 57 L. Ed. 716.

This is not a case like Bell v. Hood, 1946, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939, where the district court decided it lacked jurisdiction even to consider whether it had jurisdiction of the subject matter of the complaint. Here the district court decided it had such jurisdiction,[2] and we are called upon to determine whether the tortious taking of property by federal officials acting beyond the scope of their authority which undoubtedly is a tort cognizable in a state court also creates a cause of action cognizable in the United States District Court because it is alleged this action violates the Fifth Amendment.

In Bell v. Hood, the refusal of the district court to consider this question, and its affirmance by the court of appeals[3] was reversed, and the cause returned to the district court to determine whether the complaint stated a federal cause of action.

On its return to the district court, that court, in a very able opinion by Judge Mathes, held that no federal cause of action existed for the acts of federal officials violating

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[2] Unlike Lowe v. Manhattan Beach City School District of Los Angeles County, 222 F. 2d 258, 9 Cir., 1955, where the district court held it had no jurisdiction.

[3] Bell v. Hood, 9 Cir., 1945, 150 F. 2d 96.

the Fourth and Fifth Amendments.[4] His reasoning is that the due process clause of the Fifth Amendment applies only to the federal government,[5] and not to individuals.[6]

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[4] Bell v. Hood, D. C. S. D. Cal. 1947, 71 F. Supp. 813.

[5] That the Fifth Amendment applies only to the acts of the federal government is settled beyond doubt. See, e.g., Spies v. People of the State of Illinois, 1887, 123 U. S. 131, 166, 8 S. Ct. 21, 31 L. Ed. 80; Burdeau v. McDowell, 1921, 256 U. S. 465, 476, 41 S. Ct. 574, 65 L. Ed. 1048. In Feldman v. United States, 1944, 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408, the Court said: "* * * [F]or more than one hundred years, ever since Barron v. [Mayor and City Council of City of] Baltimore [1833], 7 Pet. 243 [32 U. S. 243], 8 L. Ed. 672, one of the principles of our Constitution has been that these [the Fourth and Fifth] Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. Brown v. Walker, 161 U. S. 591, 606, 16 S. Ct. 644, 650, 40 L. Ed. 819; Jack v. [State of] Kansas, 199 U. S. 372, 380, 26 St. Ct. 73, 75, 50 L. Ed. 234; Twinning v. [State of] New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97." 322 U. S. at page 490, 64 S. Ct. 1083.

[6] Mr. Justice Black stated in Bell v. Hood that "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments" is a question which "has never been specifically decided by this Court." 327 U. S. at page 684, 66 S. Ct. 777. In Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, however, the Supreme Court clearly indicated that there was no civil action for damages based upon the Fourth Amendment against officers who had violated it seizing plaintiff's property. Speaking of the possible nonfederal liability of the offending officers, the Court said: "What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies." 232 U. S. at page 398, 34 S. Ct. 346.

In fine, the federal government has created no cause of action enforceable in its courts for such torts under the state law, and hence the district court here lacked jurisdiction of the subject matter.

Judgment is reversed, and the district court ordered to enter an order dismissing the action for failure to state a claim arising under the laws of the United States.

CHAMBERS, Circuit Judge (concurring).

I believe that here we have a case where the Congress by legislation could give us jurisdiction. I do not believe that it has. Plaintiff seeks no relief against the United States government. He wants it off of the private hide of government officials. The basis for this is not in the Constitution per se.

If my associates mean that the district court did not have jurisdiction because of, or in the sense of, no claim being stated under the Constitution or Laws of the United States, I concur. I think that is what they mean.

While we do not here have the matter of collateral attack, I do believe the judgment as rendered, unappealed from, would be valid as against collateral attack. In that sense I think there was "jurisdiction."

My thoughts herein closely coincide with those expressed in the very fine opinion of Judge Mathes in Bell v. Hood, D. C. S. D. Cal., 71 F. Supp. 813.

APPENDIX G

Complaint

(Filed—September 24, 1962)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : HUDSON COUNTY

DOCKET NO. L-191162

FRANK J. FARLEY, Treasurer of the County of Hudson, and COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION, FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00), and all persons interested therein,

Respondents

Petitioners, FRANK J. FARLEY, Treasurer of the County of Hudson, and COUNTY OF HUDSON, complaining of the respondents, say:

1. Petitioner, Frank J. Farley, is the Treasurer of the County of Hudson.

2. On January 16, 1962, one Joseph V. Moriarty entered a plea of guilty to Indictment No. 313 returned against him by the Grand Jury of Hudson County, charging him

with the violation of the gambling laws of this State, specifically N.J.S. 2A:121-3b.

3. Thereafter, on March 2, 1962, said Moriarty was sentenced pursuant to said plea to a minimum of two and a maximum of three years in the State Prison. Said Moriarty since the last mentioned date, has been incarcerated in the State Prison in Trenton, New Jersey.

4. Upon information and belief, on July 3, 1962, there was discovered in private garages at 127-131 Oxford Avenue, City of Jersey City, County of Hudson, two cars belonging to the said Joseph V. Moriarty, one of the cars however, being registered in the name of one Anne Petrick. In the said cars there were many items of personal property, including apparatus adapted to or used in connection with activities in violation of the gambling laws of this State, and in one of those cars, there was found the sum of $2,438,110.00 in currency.

5. Upon information and belief, all of the aforesaid property of Joseph V. Moriarty, including the aforesaid moneys, were contraband and subject to seizure and forfeiture pursuant to N.J.S. 2A:152-6, et seq.

6. Upon information and belief, said automobiles and said items of personal property belonging to said Joseph V. Moriarty were seized by the police of Jersey City, and is being held by them for the County of Hudson.

7. Upon information and belief, the said moneys were taken by agents of the Federal Bureau of Investigation and said moneys were thereafter turned over to the United

States Marshal for the District of New Jersey, and thereafter turned over to the District Director of Internal Revenue at Newark, New Jersey, who deposited the said moneys in the National State Bank of Newark.

8. Upon information and belief, the aforesaid moneys of said Joseph V. Moriarty are being held subject to a determination by a court of competent jurisdiction that part or all of said moneys should be turned over to persons or governmental agencies other than the United States of America.

9. Upon information and belief, by reason of the foregoing, the County of Hudson has actual or constructive custody of the $2,438,110.00.

10. Upon information and belief, the above mentioned currency was used and intended to be used by the said Joseph V. Moriarty as an integral part of his illegal gambling operation and was the proceeds thereof by reason of which gambling said Joseph V. Moriarty did enter the aforesaid plea of guilty to the aforesaid indictment.

11. Six months have elapsed from the date of the entry of the record of such plea of guilty by the said Joseph V. Moriarty.

12. Upon information and belief, Christopher L. Gross, the District Director of Internal Revenue, caused to be filed with the Hudson County Register a lien arising out of an alleged jeopardy assessment for delinquent taxes due by Joseph V. Moriarty in the sum of $3,422,792.66, of which amount the sum of $3,395,665.33 was assessed against said Joseph V. Moriarty on July 5, 1962. Upon

information and belief, on July 9, 1962, a Notice of Levy was served on Lawrence A. Whipple, Prosecutor of Hudson County, by Chris L. Gross, District Director of Internal Revenue, alleging an internal revenue tax lien in the amount of $3,422,792.66 on all the property, moneys, credits and bank deposits in the possession of the said Prosecutor of Hudson County belonging to or owned by said Joseph V. Moriarty.

13. Upon information and belief, there is presently pending in the Superior Court of New Jersey, Chancery Division, Mercer County, an action brought by the State of New Jersey, by Arthur J. Sills, Attorney General of New Jersey, against Christopher L. Gross and the National State Bank of Newark, wherein the State of New Jersey claims title by reason of the fact that there has been no claim to the said moneys, and therefore the State of New Jersey is entitled thereto under the alleged common law principle of *bona vacontia,* and said complaint also seeks the custody of the said moneys under the five-year Custodial Escheat Act.

14. Upon information and belief, there is also a suit by Irving and Martin Brenner against Ralph Bachman, Christopher Gross, John Doe, Richard Roe, and National State Bank of Newark, which suit was removed to the Federal District Court of New Jersey, where it is now pending. Said Irving and Martin Brenner were, on July 3, 1962, the owners of the garage where the said moneys were found. Upon information and belief, the plaintiffs in said suit merely seek custody thereof for the benefit of the rightful owners.

15. Upon information and belief, the City of Jersey City asserts a claim to the said moneys by reason of R.S. 40:47-20. No action or proceeding has as yet been filed by the City of Jersey City.

16. Upon information and belief, one Frank Monziano asserts a claim to said moneys by reason of the fact that he had contracted to buy the garage where the said moneys were found. No action or proceeding has as yet been filed by said Frank Monziano.

17. The said sum of $2,438,110.00 is contraband and subject to forfeiture for the sole use and gain of the County of Hudson by reason of N.J.S. 2A:152-9.

WHEREFORE, petitioners demand judgment:

(a) Adjudicating and decreeing that the aforesaid currency in the sum of $2,438,110.00 be forfeited to the sole use and gain of the County of Hudson, by reason of its being contraband and pursuant to N.J.S. 2A:152-9; and

(b) For such other and further relief as to the Court may be just and proper.

WILLIAM F. KELLY, JR.,
Attorney for Petitioners.
By: s/ ISADORE GLAUBERMAN
of Counsel.

Appendix G

Petition for Removal

(Filed—October 16, 1962.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANK J. FARLEY, Treasurer of the County of Hudson, and COUNTY OF HUDSON,

Plaintiff,

vs.

TWO MILLION, FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00) and all persons interested therein,

Defendants.

To the Honorable Judges of the United States District Court for the District of New Jersey:

The petition of Chris L. Gross, District Director of Internal Revenue for the Newark District of New Jersey, respectfully shows:

1. On September 24, 1962 the above-entitled in rem action was commenced in the Superior Court of New Jersey, Law Division, Hudson County against the petitioner as one of the persons interested in the res of this action. The plaintiff in the action prays for a judgment adjudicating

and decreeing that the sum of $2,438,110.00 be forfeited for the sole use and gain of the County of Hudson and for such other relief as the court may deem just and proper.

2. The said Chris L. Gross was and now is the duly appointed District Director of Internal Revenue for the Newark District of New Jersey and as such the petitioner is charged with the administration within the Internal Revenue District of the Internal Revenue laws including the collection and auditing program and is responsible for the determination of income tax liabilities, assessment of such liabilities and the collection and disposition of all Internal Revenue taxes.

3. At all times mentioned in the complaint filed in this action petitioner was acting solely under the color of his office, and all his actions in connection with the matters charged in said complaint were committed by him under color of his office, to wit:

Pursuant to 26 U.S.C.A. §6301 and 26 C.F.R. 301.6301-1 which charge the petitioner with the duty to collect in the Internal Revenue District all income taxes imposed by Internal Revenue laws and 26 U.S.C.A. §6861 and 26 C.F.R. 301.6861-1 which require petitioner to make jeopardy assessments when the collection of a deficiency in income tax would be jeopardized by delay, on July 6, 1962 petitioner caused to be filed in the Hudson County Register's office a lien arising out of a jeopardy assessment for delinquent income taxes due by a certain Joseph V. Moriarty in the sum of $3,395,655.33.

Pursuant to the authority granted petitioner by 26 U.S.C.A. §6331 and 26 C.F.R. 301.6331-1 on July 9, 1962

he caused to be served a notice of levy for delinquent income taxes due on funds in possession of the United States Marshal for the District of New Jersey, which funds belonged to a certain Joseph V. Moriarty. On July 16, 1962 the sum of $2,438,110.00 was received from the United States Marshal for the District of New Jersey pursuant to the above-noted levy.

In accordance with the provisions of 26 U.S.C.A. §§7808 and 7809, on July 16, 1962 the above-mentioned $2,438,-110.00 was deposited in the National State Bank of Newark, New Jersey which is the depositary for Internal Revenue collections for this District, for appropriate processing whereby within 24 hours said moneys were credited to the account of the Secretary of the Treasury in the Federal Reserve Bank of New York and thus covered into the United States Treasury.

4. The petitioner was served with a summons and complaint and order to show cause in the above-entitled suit within the said District of New Jersey on September 26, 1962 and the time for the removal of this case has not expired.

5. This petition is accompanied by a bond with good and sufficient surety conditioned that your petitioner will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this action was not removable or was improperly removed.

6. Petitioners files herewith a copy of all process pleadings and orders served upon him in this action.

WHEREFORE, petitioner prays that the said action may be removed from said state court into this court for trial and

determination, as provided for by Title 28 §1442(a)(1) of the United States Code.

s/ CHRIS L. GROSS,
District Director of Internal Revenue Service.

(Verified by Chris L. Gross on October 16, 1962.)

Appendix G

Amendment to Supplemental Complaint

(Filed—May 22, 1968)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 819-62

FRANK J. FARLEY, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00), and ALL PERSONS INTERESTED THEREIN,

Respondents.

Petitioners, County of Hudson, and Joseph Stapleton, Treasurer of Hudson County, pursuant to leave heretofore granted by the Court, and as an amendment to the Supplemental Complaint, say:

THIRD COUNT

1. Petitioners repeat and reallege as part of this Count, the allegations of paragraphs 1 to 10 inclusive, of the Second Count with like effect as if herein fully realleged.

2. Petitioners are informed that on July 7, 1962, the Federal Bureau of Investigation turned over the sum of $2,438,110 to the United States Marshal.

3. Petitioners are informed that on or about July 5, 1962, Chris L. Gross, then District Director, filed a lien allegedly arising out of a jeopardy assessment in the amount of $3,422,792.66 for delinquent taxes claimed to be due from Joseph V. Moriarty, and on July 7, 1962, the said District Director caused a notice of levy to be served on the United States Marshal who had custody of the money.

4. Petitioners are informed that on July 16, 1962, the United States Marshal turned over the said sum of $2,438,110 to the said Chris L. Gross, who took possession thereof and deposited it in the Director's Depository Bank, thereby covering the said money into the Treasury of the United States.

5. At the time that said Chris L. Gross filed the lien arising out of the alleged jeopardy assessment for delinquent taxes against Moriarty, the said Moriarty's right, title and interest in the said $2,438,110 had already been forfeited to Hudson County, and the said Moriarty had no right therein to which the said jeopardy assessment could attach, and that the said Chris L. Gross, then District Director, had no right to take possession on July 16, 1962 of said sum of $2,438,110 and deposit the said moneys into the Director's Depository Bank.

WHEREFORE, petitioners demand judgment on this Count against defendant Chris L. Gross in the sum of $2,438,110, with interest at 6% from July 16, 1962.

WILLIAM F. KELLY, JR.
Hudson County Counsel
Attorney for Petitioners
By ISADORE GLAUBERMAN
Special Counsel

Answer to Amendment to Supplemental Complaint

(Filed—May 29, 1968)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 819-62

FRANK J. FARLEY, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00), and ALL PERSONS INTERESTED THEREIN,

Respondents.

Defendant Chris L. Gross, through his attorney, David M. Satz, Jr., United States Attorney for the District of New Jersey (by Kenneth P. Zauber, Assistant United States Attorney) by way of answer to the Amendment to the Supplemental Complaint, says:

THIRD COUNT

1. Defendant was not a party to the allegations of paragraphs 1 to 10 of the Second Count, but relies on the answers to said allegations as if herein fully realleged.

2. Defendant admits the allegation of paragraph 2 of the Third Count of the Amendment to the Supplemental Complaint.

3. Defendant admits the allegations of paragraph 3 of the Third Count of the Amendment to the Supplemental Complaint.

4. Defendant admits the allegations of paragraph 4 of the Third Count of the Amendment to the Supplemental Complaint.

5. Defendant denies the allegation of paragraph 5 of the Third Count of the Amendment to the Supplemental Complaint.

6. Defendant denies the allegations of paragraph 6 of the Third Count of the Amendment to the Supplemental Complaint.

FIRST AFFIRMATIVE DEFENSE

The Third Count of the Amendment to the Supplemental Complaint does not state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

This Court has no jurisdiction over defendant Chris L. Gross.

WHEREFORE, defendant demands that the Third Count of the Amendment to the Supplemental Complaint be dismissed as to him and that the United States be substituted as a party defendant pursuant to the provisions of Title 26, United States Code, Section 7426.

DAVID M. SATZ, JR.
United States Attorney
By: s/ KENNETH P. ZAUBER
Assistant U. S. Attorney

Appendix G

Second Amendment to Supplemental Complaint

(Filed—January 8, 1969.)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 819-62

FRANK J. FARLEY, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110), and ALL PERSONS INTERESTED THEREIN,

Respondents.

Petitioners, County of Hudson, and Joseph Stapleton, Treasurer of Hudson County, pursuant to leave heretofore granted by the Court, and as a second amendment to the Supplemental Complaint, say:

THIRD COUNT

1. Petitioners repeat and reallege as part of this Count, the allegations of paragraphs 1 to 10 inclusive, of the Second Count with like effect as if herein fully realleged.

2. Petitioners are informed that on July 7, 1962, the Federal Bureau of Investigation turned over the sum of $2,438,110 to the United States Marshal.

3. Petitioners are informed that on or about July 5, 1962, Chris L. Gross, then District Director, filed a lien allegedly arising out of a jeopardy assessment in the amount of $3,422,792.66 for delinquent taxes claimed to be due from Joseph V. Moriarty, and on July 7, 1962, the said District Director caused a notice of levy to be served on the United States Marshal who had custody of the money.

4. Petitioners are informed that on July 16, 1962, the United States Marshal turned over the said sum of $2,438,110 to the said Chris L. Gross, who took possession thereof and deposited it in the Director's Depository Bank, thereby covering the said money into the Treasury of the United States.

5. At the time that said Chris L. Gross filed the lien arising out of the alleged jeopardy assessment for delinquent taxes against Moriarty, the said Moriarty's right title and interest in the said $2,438,110 had already been forfeited to Hudson County, and the said Moriarty had no right therein to which the said jeopardy assessment could attach, and that the said Chris L. Gross, then District Director, had no right to take possession on July 16, 1962 of said sum of $2,438,110 and deposit the said moneys into the Director's Depository Bank.

WHEREFORE, petitioners demand judgment on this Count against the United States of America, in the sum of $2,438,110, the amount of money levied upon, together

with interest at the rate of six percent (6%) per annum from July 16, 1962, pursuant to 26 U.S.C. §7426 (a)(2)(B) and (g)(1).

WILLIAM F. KELLY, JR.
Hudson County Counsel
Attorney for Petitioners.
By s/ ISIDORE GLAUBERMAN,
Special Counsel.

Appendix G

Amended Answer to Amendment to Supplemental Complaint

(Filed—January 10, 1969.)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 819-62

FRANK J. FARLEY, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

v.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110.00), and ALL PERSONS INTERESTED THEREIN,

Respondents.

Defendant, Chris L. Gross, through his attorney, David M. Satz, Jr., United States Attorney for the District of New Jersey (by Kenneth P. Zauber, Assistant United States Attorney) by way of Amended Answer to Amendment to Supplemental Complaint (filed at this time by leave of Court) says:

Appendix G

THIRD COUNT

Defendant repeats and realleges the answer to Paragraphs 1 through 6 of the Third Count of the Answer to Amendment to the Supplemental Complaint.

FIRST AFFIRMATIVE DEFENSE

Defendant repeats the first affirmative defense of his Answer to the Amendment to the Supplemental Complaint.

SECOND AFFIRMATIVE DEFENSE

Defendant repeats his second affirmative defense in the Answer to the Amendment to the Supplemental Complaint.

THIRD AFFIRMATIVE DEFENSE

This Court has no jurisdiction over the subject matter of this action.

FOURTH AFFIRMATIVE DEFENSE

The statute of limitations has run under the provisions of Title 26, United States Code, Section 7426.

WHEREFORE, defendant demands that the Third Count of the Amendment to the Supplemental Complaint be dismissed as to him, that the United States be substituted as a party defendant, and that the complaint be dismissed in its entirety pursuant to the provisions of Title 26, United States Code, Section 7426.

DAVID M. SATZ, JR.
United States Attorney
By: s/ KENNETH P. ZAUBER
Assistant United States Attorney

Appendix G

Modified Second Amendment to the Supplemental Complaint

(Filed—January 14, 1969)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 819-62

FRANK J. FARLEY, Treasurer of the County of Hudson, and the COUNTY OF HUDSON,

Petitioners,

vs.

TWO MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND, ONE HUNDRED AND TEN DOLLARS ($2,438,110), and ALL PERSONS INTERESTED THEREIN,

Respondents.

Petitioners, County of Hudson and Joseph Stapleton, Treasurer of Hudson County, pursuant to leave granted by the Court on January 14th, 1959, modify the Second Amendment to the Supplemental Complaint, in the following respects:

(1) By adding thereto the following paragraph "6" thereof:

> "6. By virtue of 26 U.S.C., §7426 (80 Stat. 1141), enacted on or about November 2, 1966, the claim

asserted herein may be brought directly against the United States of America", and

(2) By modifying the prayer for relief contained in said Second Amendment to the Supplemental Complaint in the following manner:

"WHEREFORE, petitioners demand judgment on this Count:

(a) against the United States of America, in the sum of $2,438,110, the amount of money levied upon, together with interest at the rate of six percent (6%) per annum from July 16, 1962, pursuant to 26 U.S.C., §7426(a)(2)(B) and (g)(1); and

(b) In the event, and only in the event, that it should be determined that 26 U.S.C., §7426 does not apply to the within claim because the action had been instituted prior to the enactment of said statute, petitioners demand judgment, in the alternative against defendant Chris L. Gross, the former District Director of Internal Revenue, in the sum of $2,438,110, together with interest at six percent (6%) per annum from July 16, 1962, and that a certificate of probable cause be issued and that the amount of the judgment shall be paid out of the proper appropriation by the Treasury pursuant to 28 U.S.C., §2006."

WILLIAM F. KELLY, JR.,
County Counsel
Attorney for Petitioners
By ISADORE GLAUBERMAN, Special Counsel

APPENDIX H

Letter of David M. Satz, Jr. Esq., dated July 20, 1962 (Marked Exhibit P-32)

DMS Jr/mbs

July 20, 1962

Leo A. Holley, Esquire
123 Cleveland Street
Orange, New Jersey

Re: 127-131 Oxford Ave., Jersey City, N.J.

Dear Mr. Holley:

This is to acknowledge on behalf of the Federal Bureau of Investigation and this office your letter of July 16, 1962. You seek, on behalf of your clients, Irving and Martin Bremmer and their wives, the return of certain personal property located at the above named premises allegedly owned by your clients.

Please be advised that, based on proof that the personal property belonged to Joseph V. Moriarty, federal authorities by lawful means took custody of such items. The Internal Revenue Service, Department of the Treasury, pursuant to statutory authority, instituted and has completed effecting a jeopardy assessment of the monies belonging to Mr. Moriarty. These monies are in the custody of the Internal Revenue Service for the purpose of satisfying his legal obligations.

Any remedy which you care to pursue should be taken in accordance with appropriate procedures as provided by law. The monies which are credited presently to the accounts of the Internal Revenue Service will be made available, as will any other property belonging to Mr. Moriarty

if it is determined subsequently by a court of competent jurisdiction that part or all of said property should be redistributed to persons or governmental agencies other than the United States of America.

Very truly yours,

David M. Satz, Jr.
United States Attorney

cc: Federal Bureau of Investigation
Newark, New Jersey

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1546

JOSEPH STAPLETON, Treasurer of the County of Hudson, and the COUNTY OF HUDSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 5a-30a) is reported at 454 F. 2d 1210. The opinion of the district court (Pet. App. B, 31a-38a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1972, and the petition for rehearing was denied February 28, 1972 (Pet. App. A, 1a-4a). The petition for a writ of certiorari was filed on May 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly held that the district court lacked jurisdiction over an action, removed from a state court, involving title to property in which the United States claims an interest.

2. Whether petitioners failed to establish that $2,438,110 found by workmen in a garage and deposited in the United States Treasury in partial satisfaction of liens for unpaid taxes, had previously been forfeited to them under applicable state law.

STATUTES INVOLVED

The pertinent provisions of 26 U.S.C. 6321, 6322, and 7426, 28 U.S.C. 1442 and 2006, and N.J.S.A. 2A:152-6 and 152-7, are set forth at Pet. 4-6 and Pet. App. E, 73a-78a.

STATEMENT

On July 3, 1962, some workmen were renovating private garages in Jersey City, New Jersey, when they discovered $2,438,110 in the trunk of an old automobile parked in one of the garages. Various

other articles pertaining to Joseph V. Moriarty [1] were also found in the garage. The Federal Bureau of Investigation was called to the scene, and agents from that department took initial control of the money. On July 5, 1962, the District Director of Internal Revenue made a jeopardy assessment against Moriarty for income tax and interest due in the amount of $3,395,655.33. On July 9, 1962, the government's notice of lien was filed in the Hudson County Register's Office and a notice of levy was served on the United States Marshal who had custody of the currency. On July 16, 1962, the money was turned over to the Internal Revenue Service by the United States Marshal and deposited in the National State Bank of Newark, New Jersey, which is the depository for internal revenue collections for New Jersey. Within twenty-four hours the funds were credited to the account of the Secretary of the Treasury in the Federal Reserve Bank of New York. (Pet. App. A, 6a.)

On September 24, 1962, petitioners filed a complaint in the Superior Court of New Jersey, Law Division, Hudson County, seeking a judgment that the money be forfeited to the County of Hudson, by reason of its being contraband, pursuant to N.J.S.A. 2A:152-9. The complaint named Chris L. Gross, the District Director of Internal Revenue, as one of the claimants to the fund. On October 16, 1962, Mr.

[1] Joseph V. Moriarty has never claimed the $2,438,110. He was the head of a "numbers racket" operating in Jersey City (Pet. App. B, 32a).

Gross filed a petition for removal in the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. 1442(a)(1), on the ground that the proceeding in the state court was an action commenced against an officer of the United States for an act performed under color of office. The suit was removed to the district court where the defendant moved to dismiss, claiming that the court lacked jurisdiction. Thereafter, on February 17, 1964, petitioners filed a supplemental complaint and subsequently filed amendments to that supplemental complaint, one of which added the United States as a party defendant. (Pet. App. A, 6a-8a; Pet. App. G, 90a-109a.)

The district court asserted jurisdiction and, relying upon a state statutory presumption, held that the funds were forfeited to petitioners prior to the effective date of the tax lien (Pet. App. B, 31a-38a). The court of appeals reversed, holding that since the state court had lacked jurisdiction over the petitioners' suit, the district court was without jurisdiction upon removal. Judge McLaughlin's opinion for the court further stated that in the circumstances here the presumption relied upon by the district court was unavailable and that forfeiture under applicable state law would have occurred only if "the money was an implement or device made or used for the purpose of gambling" and that petitioners had failed to offer such proof (Pet. App. A, 15a). Judge Adams, concurring, agreed that the district court was without jurisdiction but stated that if jurisdiction were pres-

ent he would have remanded the case to the district court for determination whether in fact the money had been used in a gambling operation (Pet. App. A, 20a-30a). Judge Ganey concurred in the result of the court's opinion and with Judge Adams' concurrence (Pet. App. A, 20a).

ARGUMENT

1. Petitioners contend (Pet. 13-26) that the district court had jurisdiction on removal on the ground that the state court from which the action was removed had jurisdiction.[2]

The instant action involves title to property in which the United States claims an interest. As the court of appeals properly stated (Pet. App. A, 12a), such an action "is a suit against the sovereign which absent the consent of the sovereign, cannot be maintained in the state court." See *Dugan* v. *Rank*, 372 U.S. 609, 619-626; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687. The United States has

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[2] Petitioners also assert (Pet. 22-24) that the decision of the court of appeals below conflicts with *Johnston* v. *Earle*, 245 F. 2d 793 (C.A. 9). That case involved an action brought in federal court against two Internal Revenue officers for the alleged tortious seizure and conversion *to their own use* of plaintiff's property. In holding that the district court lacked jurisdiction over a suit against Federal officers acting without authority, the court of appeals noted that the suit would be cognizable in a state court. In contrast, in this case money was seized by officers acting within their authority and it is the United States, not the officers in their personal capacities, which claims an interest in the property. The asserted conflict therefore does not exist.

consented to such suits in state courts only in the narrow circumstances described in 28 U.S.C. 2410, and petitioners do not contend that jurisdiction in this case can be based on that statute; other state court action with respect to property taken or detained under the federal revenue laws is expressly prohibited by 28 U.S.C. 2463. See *New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404, 408-409. Thus the state court lacked jurisdiction over petitioners' suit.[3] Accordingly the district court also was without jurisdiction.[4] As this Court stated in *Minnesota* v. *United States*, 305 U.S. 382, at 389:

> If Congress did not grant permission to bring this * * * proceeding in a state court, the federal court was without jurisdiction upon its removal. For jurisdiction of the federal court on

[3] Although petitioners concede (Pet. 15) that their action was originally filed as an *in rem* proceeding, they argue (Pet. 17-21) that it was in fact against the District Director in his official capacity and that the state court therefore had *in personam* jurisdiction. This amounts in effect to the untenable assertion that the sovereign immunity of the United States against unconsented suits in state courts may be overcome by the simple expedient of naming as defendant a government officer in his official capacity rather than the United States. This argument was rejected by this Court in *Dugan* v. *Rank*, *supra*. See also *In re Escheat of Monies Deposited in U.S. Dist. Ct.*, 187 F. 2d 131, 135, n. 13. Petitioners cite no authority for their novel proposition and apparently rely upon the government's failure to raise jurisdictional objections in two taxpayer suits brought in state courts during the nineteenth century.

[4] Objection to the district court's lack of jurisdiction was timely made in that court. Cf. *Grubbs* v. *General Electric Credit Corp.*, No. 71-257, O.T. 1971, decided April 18, 1972.

> removal is, in a limited sense, a derivative jurisdiction. Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377, 383; *General Investment Co.* v. *Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 288.[5]

And as Mr. Justice Frankfurter has pointed out, "[t]he derivative nature of removal jurisdiction * * * is not based upon technical rules of law" but instead serves the legitimate purpose in our federal system of permitting a defendant "to transfer the suit to a neutral federal court without losing or gaining any privileges by such transfer." *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 462 (dissenting opinion).

2. In addition to the district court's lack of jurisdiction, there is an additional independent reason supporting the result reached by the court of appeals. Petitioners, having the burden of proof, did not establish the necessary factual elements required for forfeiture under New Jersey law.

The State of New Jersey has two basic statutes

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[5] This long-standing doctrine of derivative jurisdiction renders irrelevant petitioners' claim (Pet. 24-26) that 26 U.S.C. 7426 would have conferred upon the district court original jurisdiction. Nevertheless, that statute was enacted several years after removal of this case to the district court (Section 110(a) of the Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1142) and was not intended to apply retroactively. See H. Rep. No. 1884, 89th Cong., 2d Sess. 81-82; S. Rep. No. 1708, 89th Cong., 2d Sess. 35-36.

providing for the forfeiture of property used for gambling purposes, N.J.S.A. 2A:152-6 and 152-7. Under the second statute, moneys seized in connection with an arrest are "deemed prima facie to be contraband of law as a gambling device." That statute, as the court of appeals observed (Pet. App. A, 26a-28a), is not applicable under the facts of the instant case where the moneys were seized by federal officers not in connection with any arrest. Therefore, contrary to petitioners' contention (Pet. 28-33), *Farley* v. *$168,400.97*, 55 N.J. 31, 259 A. 2d 201, which involved the presumption of N.J.S.A. 2A:152-7, does not govern this case.

Since the factual prerequisites for application of the statutory presumption are not present (nor do petitioners contend otherwise), petitioners rely on N.J.S.A. 2A:152-6, which requires, for forfeiture, that petitioners prove that the money to be forfeited was used for the purpose of gambling. Petitioners failed to make the requisite showing. As the court of appeals stated (Pet. App. A, 16a), there was no "legitimate evidence" that the funds in issue were the result of or used in a gambling operation. The money was accidentally found by workmen in a garage with personal belongings of Joseph Moriarty. There was nothing taken from the garage which was less than six years old at the time of the discovery, and most of the material was over 10 years old. There was no gambling paraphernalia in the garage. Moreover, the New Jersey statute of limitations on forfeitures, N.J.S.A. 2A:14-10, reveals a legislative

intention that property be forfeited only on a showing that it has been used in the conduct of a specific illegal act within one year prior to the commencement of the action.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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